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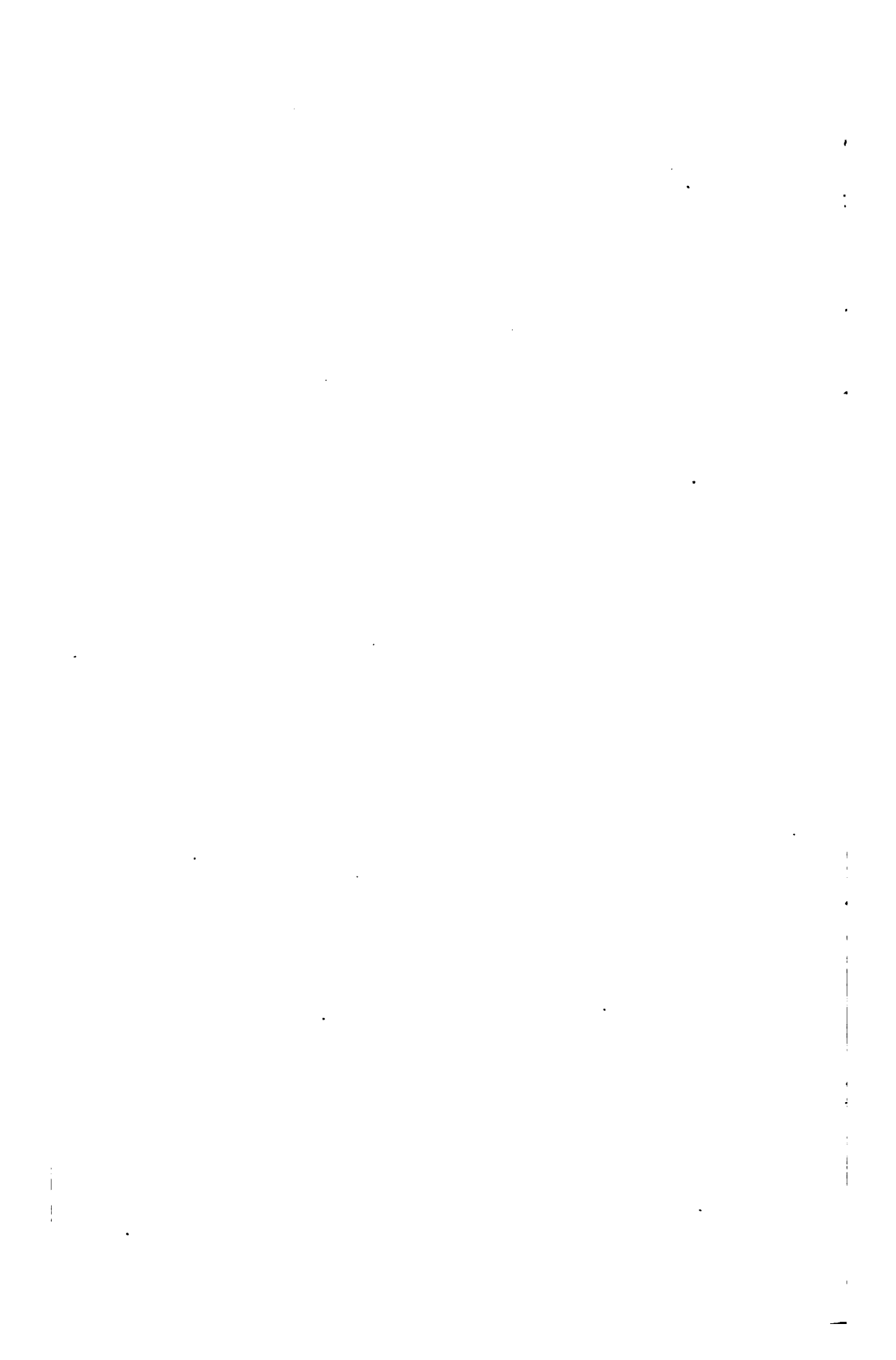
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REPORTS OF CASES ARGUED
AND DETERMINED
IN THE
SURROGATES' COURTS
OF THE
STATE OF NEW YORK
TOGETHER WITH
CASES IN OTHER COURTS OF THE STATE
RELATING TO DECEDENTS' ESTATES
WITH ANNOTATIONS
EDITED BY
CHARLES H. MILLS
OF THE ALBANY BAR

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REPORTS OF CASES
ARGUED AND DETERMINED IN
THE SURROGATES' COURTS
OF THE
STATE OF NEW YORK

WITH OTHER DECISIONS AFFECTING DECEDENTS' ESTATES.

In the Matter of the Accounting of L. LAFLIN KELLOGG, as
Executor of GEORGE H. MORGAN, Deceased, Respondent.
GEORGE D. MORGAN, Appellant; JUNIUS S. MORGAN et al.,
Respondents.

(Court of Appeals, April 13, 1915.)

TESTAMENTARY TRUSTEES—EFFECT OF RENUNCIATION OF TRUST BY ONE OF
TWO OR MORE TRUSTEES—WHEN RENOUNCING TRUSTEE MAY NOT RE-
TRACT HIS REFUSAL TO ACT—TRUSTEES MAY RECEIVE AND INVEST TRUST
ESTATE OF PERSONALTY BEFORE FINAL ACCOUNTING OF EXECUTOR.

1. Where one of two or more trustees refuses to accept and execute a trust the estate vests in the others the same as though the trustee refusing to act were dead or had not been named, and a person named as trustee may not retract his refusal to accept the trust after the others have entered upon their trust duties. He should be held to his refusal or renunciation unless, at least, it is withdrawn before the others have acted.

2. Trustees may receive any part of the trust estate consisting of personalty before the executor has accounted and been directed to pay it over, and are not bound to wait until the final accounting of an executor before investing the money in the manner directed by the testator.

Matter of Morgan, 165 App. Div. 987, modified.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 24, 1914, which affirmed a decree of the New York County Surrogate's Court settling the accounts of L. Laflin Kellogg as executor of George H. Morgan, deceased.

The facts, so far as material, are stated in the opinion.

Henry A. Wise and Ernest A. Bigelow for appellant. The appellant's renunciation of his trusteeship was nullified by his subsequent retraction thereof before any estate vested or could properly vest in his co-trustees and he was entitled to receive the residuary bequest jointly with L. L. Kellogg and J. S. Morgan, as trustees. (Matter of Hood, 98 N. Y. 363; Coddling v. Newman, 3 T. & C. 364; 63 N. Y. 639; Matter of Treadwell, 37 Misc. Rep. 584; Matter of Wilson, 92 Hun, 318; Oasey v. Gardiner, 4 Bradf. 13; Robertson v. McGeogh, 11 Paige, 640; Matter of Haug, 29 Misc. Rep. 38; Matter of Clute, 37 Misc. Rep. 710; Matter of Wilson, 92 Hun, 322.)

Abram J. Rose and William K. Hartpence for L. Laflin Kellogg as executor, respondent. The findings of the referee having been confirmed by the surrogate and the decision of the surrogate having been unanimously affirmed by the Appellate Division, this court must assume that the findings are sustained by evidence, and unless there is some other exception which presents a question of law, there is nothing left but for this court to affirm the order and decree appealed from. (Cardozo's Jurisdiction of the Court of Appeals [2d ed.], § 56; Marden v. Dorothy, 160 N. Y. 39; Matter of Hall, 164 N. Y. 196; Krekeler v. Aulbach, 169 N. Y. 372; Matter of Mercantile Trust Co., 210 N. Y. 83; Hilton v. Ernst, 161 N. Y. 226.) The surrogate under the facts and circumstances of this case was without power either to permit the said George Denison Morgan to retract his renunciation to act as trustee or to reappoint

him as a trustee under said will. (Redfield on Surr. Pr. [7th ed.] §§ 319, 514.) In the case of a renunciation by a trustee, there can be no renunciation so as to restore as trustee the person who has renounced. (King v. Donnelly, 5 Paige, 46; Matter of Van Schoonhoven, 5 Paige, 560; Matter of Stevenson, 3 Paige, 420; Matter of Reynolds, 11 Hun, 41; Earle v. Earle, 16 J. & S. 18; 93 N. Y. 104; Matter of Crossman, 20 How. Pr. 350, 354; Burrill v. Sheil, 2 Barb. 457.)

Clarence Blair Mitchell and William G. Choate for James S. Morgan et al., respondents. The finding of the referee approved by the surrogate and affirmed by the Appellate Division that Junius S. Morgan and L. Laflin Kellogg were the only qualified and acting trustees under the will, was correct. (Matter of Van Schoonhoven, 5 Paige, 559; King v. Donnelly, 5 Paige, 46; Matter of Stevenson, 3 Paige, 420; Burritt v. Silliman, 13 N. Y. 93; Earle v. Earle, 16 J. & S. 18; 93 N. Y. 104; Perry on Trusts, §§ 267, 273.)

A. Perry Osborn for Sarah S. Gardner, respondent. The surrogate's decree affirmed by the Appellate Division correctly found that George D. Morgan having renounced as trustee, Junius S. Morgan and L. Laflin Kellogg are the only qualified and acting trustees under the will. (Matter of Van Schoonhoven, 5 Paige, 559; King v. Donnelly, 5 Paige, 46; Matter of Stevenson, 3 Paige, 420; Burritt v. Silliman, 13 N. Y. 93; Earle v. Earle, 16 J. & S. 18; 93 N. Y. 104; Perry on Trusts, §§ 267, 273.)

Daniel J. Mooney for Alexander P. Morgan, respondent.

MILLER, J.—The first question in this case arises upon a bequest in the following words: "I give and bequeath unto my children, Caroline Lucy Morgan, Junius Spencer Morgan

and George Denison Morgan, all my silver, bric-a-brac and pictures absolutely, to be divided between them as they shall agree among themselves. If, however, they cannot agree as to the division, then the same shall be divided by lot among them, my eldest child being given first choice." After the death of the testator, the legatees, his three children, met and made a tentative selection of the articles of personal property which each desired to acquire, either by purchase or under the said clause of the will, but without undertaking to distinguish between bric-a-brac and furniture, the agreement being that each would purchase at the inventory prices such articles, so selected, as were neither silver, pictures nor bric-a-brac. The respondents Junius Spencer Morgan and Caroline Lucy Morgan received from the executor and receipted for such articles in the list of each as were classified by the executor as bric-a-brac and purchased the other articles at the inventoried prices. The appellant, however, refused to accede to the classification of bric-a-brac made by the executor and refused and declined to purchase the articles in his last classified as furniture, but made an arrangement with the executor whereby the latter was to sell at auction the articles in dispute and keep a separate account thereof so that, if it should be determined that any of them were bric-a-brac, the money should take the place of the specified articles. Of the articles so sold, the referee found that articles selling for \$721.50 were in fact bric-a-brac. However, instead of allowing that sum to the appellant, it was divided equally among the three children. The appellant urges that still other articles should be classed as bric-a-brac and that in any view the court erred in not awarding the whole sum of \$721.50 to the appellant.

Whilst by the gift to his children of all his "silver, bric-a-brac and pictures," the testator probably intended to keep in his family such articles, *e. g.*, as tapestries, we are not prepared to say, as a matter of law, that that was his intention or that

tapestries are either bric-a-brac or pictures, but think that the appellant is concluded on that branch of the case by the unanimous affirmance of the surrogate's decree. However, it seems plain that the appellant was entitled to all of the articles selected by him which were found by the referee to be bric-a-brac, and that some of them having been sold under an agreement that the proceeds of the sale should take the place of the articles, he was entitled to such proceeds. Practically the only answer suggested to that proposition is that he did not carry out his agreement made with his brother and sister, when the tentative selections were made, to purchase the articles not classed as bric-a-brac. Those articles, however, were sold either to the appellant, to the respondents, or to others, and the estate has the proceeds. It may be that the failure of the appellant to carry out the arrangement would have justified the brother and sister in insisting upon another division of the silver, bric-a-brac and pictures, but they did not do so. The only division made by them was the said tentative division which must, therefore, stand as the division agreed upon in accordance with the directions of the testator. Each, therefore, was entitled absolutely to the articles in his list which were classed as bric-a-brac, and under the arrangement with the executor the appellant was entitled to the proceeds of the bric-a-brac allotted to him.

By the will and codicil thereto the testator appointed the respondent Kellogg and his two sons, the appellant and the respondent Junius S. Morgan, as executors and trustees. The two sons renounced as executors, and the respondent Kellogg qualified as sole executor. Thereafter and on the 10th day of September, 1912, the appellant signed and acknowledged a renunciation as trustee and delivered it to the respondent Kellogg. On the hearing before the referee it was introduced in evidence without objection. On the 1st of December, 1913, the appellant executed a retraction of said renunciation as trustee. A copy thereof was delivered to the respondent Kellogg on the 4th

day of December, 1913, and it was filed with the surrogate on January 12th, 1914, and prior to the decree on the accounting of the executor. It appears by the affidavit of said Kellogg that prior to the attempted withdrawal of said renunciation, the other trustees had entered upon their duties as trustees, had set apart for the several trusts securities of the estate amounting to one million dollars and had purchased in their joint names as trustees a real estate mortgage amounting to seventy thousand dollars and corporate stock of the city of New York amounting to forty thousand dollars. After the payment of his debts and certain specific legacies, the testator gave \$200,000 to his executors and trustees in trust for the benefit of his wife, and he directed that the residue be divided into three equal parts, which he gave to his executors and trustees in trust, one of each for the benefit of each of his three children. The decree of the surrogate adjudged that the attempted revocation of the renunciation by the appellant as trustee was without force and effect and that the other trustees having entered upon their duties "they continue as such trustees and execute said trusts in accordance with the provisions of said will."

The appellant insists that the trustees had no duty to perform until the executor accounted and was directed to turn over the estate to the trustees, and that, therefore, the renunciation, which was a mere waiver of a right, was effectually withdrawn. The statute provides for the resignation of a testamentary trustee (See Code of Civil Procedure, section 2814), but not for renunciation. Section 2639 of the Code of Civil Procedure provides how an executor may renounce, and how such a renunciation may be retracted. The provision for the retraction seems to be but declaratory of the rule at common law. (See *Codding v. Newman*, 3 T. & C. 364; *Robertson v. McGeoch*, 11 Paige, 640.) A testamentary trustee derives his authority from the will. Of course, he may refuse to accept the trust, but if he does any act indicative of his acceptance, he may

not thereafter resign without the consent of the *cestui que trust* or the court. (Shepherd v. M'Evers, 4 Johns. Ch. 136; Brennan v. Willson, 71 N. Y. 502; Earle v. Earle, 16 J. & S. 18; 93 N. Y. 104.) Where one of two or more trustees refuses to accept and execute the trust the estate vests in the others the same as though the trustee refusing to act were dead or had not been named. (Matter of Stevenson, 3 Paige, 420; King v. Donnelly 5 Paige, 46; Matter of Van Schoonhoven, Id. 559.) The appellant seeks to distinguish the cases last cited on the ground that they involved devises of real estate to trustees. The estate in this case consisted entirely of personalty, and it may be that until the remaining trustees had done some act indicating their acceptance of the trust, and possibly until they had actually received, as trustees, some part of the trust estate, the appellant could have retracted his renunciation or refusal to accept the trust. It is not the law, however, that trustees may not receive any part of the trust estate, consisting of personalty, until the executor has accounted and been directed to pay it over. Whilst in case the same person is both executor and trustee, a decree of the court is the most satisfactory evidence of a separation of his duties, it is not indispensable. (Hurlburt v. Durant, 88 N. Y. 121, 127.) And even with respect to the residuary estate, the trustee may enter upon his duties as such even before his accounting and discharge as executor. (Olcott v. Baldwin, 190 N. Y. 99.) Cases dealing with the liability of a person as executor, such as Matter of Hood (98 N. Y. 363), are not decisive of the point involved in this case; but in that case it was recognized that there might be a severance of the trust fund by the executor without a judicial decree.

The trustees were not bound to wait until the final accounting of the executor before investing the money belonging to the trust funds in the manner directed by the testator. Certainly the investment of such moneys was an act of the trustees, who thereupon held the securities purchased as joint tenants. It

was then too late for the appellant to withdraw his refusal to serve as trustee. If a person named as trustee were permitted to retract his refusal to accept the trust after the others have entered upon their trust duties, complications might arise which cannot now be foreseen. The only safe rule is to hold a person to his refusal or renunciation unless, at least, it is withdrawn before the others have acted. An executor cannot retract after letters have been issued except by reason of revocation of letters or death there is no other acting executor or administrator. (Code of Civil Procedure, section 2639.)

There is a suggestion that the affidavit of the respondent Kellogg was not properly before the surrogate. It is printed in the record and there is nothing to show that any objection was interposed to its being considered. We must, therefore, assume that it was properly before the surrogate, but in any event the unanimous affirmance of the surrogate's decree would require us to assume that there was evidence to sustain the finding therein contained, that the other trustees had entered upon their duties as such.

The order and decree should be modified by directing the payment to the appellant of the proceeds of the sale of the articles of bric-a-brac selected by him amounting to \$721.50, and as thus modified affirmed, without costs.

WILLARD BARTLETT, Ch. J., HISCOCK, CHASE, COLLIN,
CARDOZO and SEABURY, JJ., concur.

Ordered accordingly.

In the Matter of the Accounting of SUSAN M. WATSON et al.,
as Executors of MARY C. HOFFMAN, Deceased, Respondents. MARGARET H. GALLATIN, Appellant.

(Court of Appeals, June 1, 1915.)

SURROGATE'S COURT—JURISDICTION TO DETERMINE OWNERSHIP OF PERSONAL PROPERTY ALLEGED TO BELONG TO ESTATE BUT CLAIMED BY AN EXECUTOR—NOT AFFECTED BY FACT THAT ONLY ONE OF TWO EXECUTORS MAKES CLAIM.

Under former section 2731 of the Code of Civil Procedure, now section 2679, a surrogate has jurisdiction to determine an issue raised by objections to executors' accounts that they had failed to account for certain personal property alleged to have belonged to the testatrix at the time of her death, ownership of which was claimed by one of said executors. The fact that there are two accounting executors, only one of whom lays claim to the property in dispute, should not deprive the Surrogate's Court of jurisdiction which it would possess in case that one were the only executor. (§ 2472, now § 2510, subd. 4.) It is the allegation that the property to which the accounting party lays claim belongs to the estate, not the actual fact of ownership, which gives the court jurisdiction. (Matter of Schnabel, 202 N. Y. 134, distinguished.)

Matter of Watson, 165 App. Div. 252, reversed.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 31, 1914, which affirmed a decree of the New York County Surrogate's Court judicially settling the accounts of the executors of Mary C. Hoffman, deceased.

Albert Stickney and Adrian H. Larkin for appellant. The controversy raised by the objections is precisely within the provisions of sections 2731 and 2472 of the Code of Civil Procedure in effect prior to September 1, 1914. (Matter of Adams, 51 App. Div. 619; Matter of Westerfield, 32 App. Div. 324; Matter of Arkenburgh, 58 App. Div. 583; Matter of Archer, 51 Misc. Rep. 260; Matter of Ammarell, 38 Misc. Rep. 399; Matter of Niles, 142 App. Div. 198; Matter of Perry, 129 App.

Div. 587; *Sexton v. Sexton*, 64 App. Div. 385; *Matter of Goundry*, 57 App. Div. 232; *Matter of Munson*, 70 Misc. Rep. 461.) The question at issue was whether any transfer had ever been made. Such a controversy has always been held to be within the jurisdiction of the Surrogate's Court. (*Matter of Schnabel*, 202 N. Y. 134.)

Paul R. Towne for respondents. The Surrogate's Court had no jurisdiction to pass upon the questions raised by the appellant involving title to the articles of jewelry which Mrs. Watson claimed. (*Matter of Cunard*, 7 N. Y. Supp. 553; *Matter of McGuire*, 106 App. Div. 131; *Matter of Slingerland*, 36 Hun, 575; *Matter of Richardson*, 31 Misc. Rep. 666; *Matter of McCarty*, 47 N. Y. Supp. 1127.)

MILLER, J.—The question involved in this appeal is whether the surrogate had jurisdiction to determine the issue raised by the objections to the executors' account interposed by the appellant to the effect that the executors had failed to account for a ruby ring and a pearl necklace which it was alleged belonged to the testatrix at the time of her death. One of the accounting executors, a daughter of the testatrix, claimed that the ring and necklace had been given to her by her mother. The surrogate referred the matter to a referee, who reported in favor of the appellant. So much of the report as related to that subject was overruled by the surrogate on two grounds, viz.: (1) That the appellant had not sustained the burden of showing that the property omitted from the schedule of account belonged to the estate of the testatrix, and (2) that in any event the surrogate did not have jurisdiction to determine the matter. The Appellate Division passed on the question of jurisdiction only and affirmed the decree "without prejudice to the appellant's right to the maintenance of an action to recover for the estate of the testatrix the articles involved in this appeal."

The Appellate Division decided the case on the authority of

Matter of Schnabel (202 N. Y. 134), in which it was decided that section 2731 of the Code of Civil Procedure had not conferred general equitable jurisdiction on the Surrogate's Court, *e. g.*, to set aside a transfer as fraudulent and void as to creditors. The appellant in this case merely invoked the jurisdiction of the surrogate to compel an executor to account for the property of his testator, and the exercise of that jurisdiction depended solely on the determination of the question of fact whether the property belonged to the testatrix at the time of her death. If the mere assertion of a claim of ownership by an executor ousts the surrogate of jurisdiction to compel an account of the property of the testator, it will be a simple matter to accomplish that result in every case in which an executor may prefer some other tribunal. Section 2731 of the Code of Civil Procedure, prior to the amendment of 1914, provided in part as follows: "On the judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by the decedent. Where a contest arises between the accounting party and any of the other parties respecting property alleged to belong to the estate, but to which the accounting party lays claim either individually or as the representative of the estate, or respecting a debt, alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest must, except where the claim is made in a representative capacity, in which case it may, be tried and determined in the same manner as any other issue arising in the surrogate's court." It would seem that the present case falls within both the letter and the spirit of the provision just quoted. The learned surrogate, however, thought otherwise for the reason that there are two accounting parties in this case and the statute uses the singular number, "accounting party," and for the further reason that the property in question did not belong to the estate of the testatrix. The first reason takes a too narrow view of the statute and the second is

based on a decision of the very question which it was thought the surrogate did not have jurisdiction to decide. Section 2472, subd. 4, of the Code of Civil Procedure (ed. 1913) provides that the Surrogate's Court has jurisdiction *inter alia* to enforce "the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate." The fact that there are two accounting executors, only one of whom lays claim to the property in dispute, should not deprive the Surrogate's Court of jurisdiction, which it would possess in case that one were the only executor. We are not concerned now with the decree to be entered in such a case, but only with the jurisdiction of the surrogate to determine the conflicting claims of the estate and of the executor individually to the property in dispute, and to protect the rights of the parties by a proper decree according to the circumstances of the particular case.

Where a contest arises respecting property "alleged to belong to the estate, but to which the accounting party lays claim, * * * individually * * * the contest must * * * be tried and determined in the same manner as any other issue arising in the surrogate's court." It is the allegation that the property to which the accounting party lays claim belongs to the estate, not the actual fact of ownership, which gives the court jurisdiction. If the surrogate had decided the fact of ownership against the appellant, the unanimous affirmance of the finding by the Appellate Division would have deprived this court of jurisdiction to review it; but the surrogate declined jurisdiction to decide the contest on the assumption that the merits of it were with the accounting party and the decision of the Appellate Division was solely on the question of jurisdiction.

That the Surrogate's Court has jurisdiction to try and determine the issues arising upon such a contest as was involved in this case has been held by different surrogates (Matter of Ammarell, 38 Misc. Rep. 399; Matter of Finn, 44 Misc. Rep.

622; *Matter of Archer*, 51 Misc. Rep. 260; *Matter of Munson*, 70 Misc. Rep. 461), by the Appellate Divisions in the third and second departments (*Matter of Goundry*, 57 App. Div. 232; *Matter of Niles*, 142 App. Div. 198; *Sexton v. Sexton*, 64 App. Div. 385; *Matter of Cavanagh*, 121 App. Div. 200; *Matter of Perry*, 129 App. Div. 587), and by this court in affirming without opinion *Sexton v. Sexton*, *supra* (174 N. Y. 510), and it was assumed, though the point does not appear to have been raised, in *Matter of Van Alstyne* (207 N. Y. 298).

Plainly the Surrogate's Court has jurisdiction to try and determine issues arising upon any contest respecting a debt alleged to be due by the accounting party to the decedent or by the decedent to the accounting party. With equal reason it should have jurisdiction to determine conflicting claims of ownership to personal property between an accounting party and his estate. The trial and determination of such issues falls far short of the exercise of general equitable jurisdiction, and we think that the statute was intended to confer jurisdiction in both classes of cases.

On the question of the burden of proof it is sufficient to say that the surrogate did not attach sufficient importance to the undisputed fact that the property in dispute was owned and possessed by the testatrix up to within a short time before her death. (See *Matter of Perry*, *supra*.)

The order of the Appellate Division and decree of the surrogate should be reversed and the proceeding remitted to the Surrogate's Court, with costs to abide the final award of costs.

WERNER, HISCOCK, CHASE, COLLIN, HOGAN and CARDOZO, JJ., concur.

Order and decree reversed, etc.

JULIA M. C. LAWRENCE, Appellant, v. CHARLES C. LITTLEFIELD, as administrator with the Will Annexed of the Estate of MARY G. PINKNEY, Deceased, et al., Defendants, and LOUIS H. MORRIS et al., Respondents.

(Court of Appeals, July 13, 1915.)

WILL—TRUST OF UNPRODUCTIVE REAL ESTATE WITH IMPERATIVE POWER OF SALE—WHEN PROCEEDS SHOULD BE APPORTIONED BETWEEN INCOME PAYABLE FROM TIME OF TESTATOR'S DEATH TO LIFE BENEFICIARY AND PRINCIPAL BELONGING TO REMAINDERMEN—WHEN INCOME COMMENCES WHERE A CONVERSION OF PROPERTY IS REQUIRED TO FORM TRUST FUND—RATE OF INTEREST IN COMPUTING INCOME—WHETHER SUPREME COURT WILL ENTERTAIN JURISDICTION OF AN ACTION WHERE RELIEF MIGHT BE OBTAINED IN SURROGATE'S COURT DISCRETIONARY.

1. Under a will creating a trust of unproductive real estate, income payable to a life beneficiary and remainder to others, with an imperative power of sale and equitable conversion of the real estate into personalty at the death of the testator, with actual sale and conversion accruing only after a considerable delay, the testator will be held to have intended that the proceeds thus and when realized should be apportioned between income payable from the time of her death to the life beneficiary and principal belonging to the remaindermen. Authorities bearing upon the principle involved collated, discussed and followed.

2. A clause of the will whereby after giving a power of sale to the executors, it was provided "that they apply such portions of the proceeds (of sales) as in their judgment they may deem proper to the payment of any taxes and assessments that may be liens upon said real estate or any part thereof and to pay over the surplus that may not be required in their judgment for the above purpose to the said * * * (plaintiff and the three other beneficiaries named with her) in the proportions mentioned in the eighth and ninth clauses of this my will, the whole of such part or share as may then fall to the said (plaintiff) to be held in trust by my executors as hereinbefore provided." construed, and held, that a contention that thereunder there was a power to sell only for payment of taxes which would give plaintiff an interest only in any surplus that might happen to be produced in that manner, cannot be sustained where there has been a prior adjudication that there was an imperative power of sale which worked an equitable conversion of all the residuary property at the date of testatrix's decease; that the provision in question was intended to give the power to sell land, pending the general conversion, for the purpose of raising money with which to pay

taxes on all the property as well as those resting on the particular piece which was sold. The fact that the power of sale was imperative did not deprive the trustees or executors of some discretion as to time and manner of sale or insure against delay in conversion during which taxes would accumulate.

3. Nor does the assumption that the real property devised to trustees was to be sold by them acting as executors and the proceeds paid to them in the former capacity by themselves acting in the latter capacity establish the proposition for the purposes of this action that until such surplus was obtained by the execution of the power there could be no income to which plaintiff would be entitled. The property was devised to the trustees for the purposes of the trust. The provision for converting it into personalty was imperative, and the fact that there was no actual income to be enjoyed by plaintiff until the proceeds of the sale were received by the trustees is the very basis for applying the rule in such a case and giving to the life tenant a sum as income during the period when she would have actually received income if the assumed intentions of the testatrix had prevailed.

4. The ordinary rule is that where a conversion of property is required to form the trust fund income will not commence until one year after the decease unless the conversion has actually been accomplished sooner, but where there has been a prior adjudication that the will "worked and effected at the time of her (testatrix's) death an equitable conversion into personal property of all of the real property," the doctrine of equitable conversion will be followed out for all purposes of the will, and the intervening period for which income is to be apportioned be deemed to commence at the date of testator's decease.

5. The income should not be figured at a greater rate than could have been realized by the trustees on a proper investment of funds if they were actually in existence, and in apportioning the income it will be the duty of the trial court to determine at what rate of interest this income should be computed.

6. While the Supreme Court, under ordinary circumstances, will refuse to entertain jurisdiction of an action seeking relief which can be fully administered in the Surrogate's Court, the question whether it will thus refuse to entertain jurisdiction is one which largely rests in its discretion, and, therefore, should be addressed to it, certainly in the first instance.

Lawrence v. Littlefield, 166 App. Div. 664, reversed.

(Submitted June 2, 1915; decided July 13, 1915.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, en-

tered March 12, 1915, which reversed an order of Special Term overruling a demurrer to the complaint and sustained such demurrer.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frederick H. Sanborn, Henry Wollman and Edward S. Seidman, for appellant. Where the will, as here, works an equitable conversion, the beneficiary will take in the same manner as though the conversion had been effected at the time of the death of the testator. (*Kane v. Gott*, 24 Wend. 641; *Fisher v. Banta*, 66 N. Y. 468; *Lent v. Howard*, 89 N. Y. 169; *Matter of Tailer*, 147 App. Div. 741.) The proceeds of the delayed sales include income payable to the life tenant as well as principal to be held for the remaindermen. (*Matter of Tuttle*, 24 Atl. Rep. 1; *Sitwell v. Barnard*, 6 Ves. 520; *Gibson v. Bott*, 7 Ves. 89; *Kilvington v. Gray*, 2 Sim. & Stu. 396; *Taylor v. Clark*, 1 Hare, 161; *Wilkinson v. Duncan*, 23 Beav. 469; *Yates v. Yates*, 28 Beav. 637; *Cox v. Cox*, L. R. [8 Eq. Cas.] 343; *In re Tinkler's Estate*, L. R. [20 Eq. Cas.] 456; *Matter of Moore*, 54 L. J. Ch. 432; *Searle v. Baker*, L. R. [2 Ch. Div. 1900] 829; *Matter of Atkinson*, L. R. [2 Ch. C. A. 1904] 160.) It was the intention of Miss Pinkney that the enjoyment by plaintiff of her entire legacy under the will should not be postponed. (*Taylor v. Clarke*, 1 Hare, 161; *Matter of Martens*, 16 Misc. Rep. 245; *Edwards v. Edwards*, 183 Mass. 581; *Williamson v. Williamson*, 6 Paige, 298; *Victor v. Harwood*, 42 Sim. 172; *Noel v. Hinley*, 7 Price, 241.) Mr. Justice Hotchkiss' conclusion as to the effect of the provisions in the will regarding payment of taxes, is untenable. (*Delehanty v. St. Vincent's O. Asylum*, 56 Hun, 55; 134 N. Y. 612; *Lamb v. Lamb*, 11 Pick. 371; *Chamberlin v. Gleason*, 163 N. Y. 214; *Matter of Martens*, 16 Misc. Rep. 245.) The Supreme Court had jurisdiction of this case and properly retained it. (*Ungrich v. Ball*, 152 App. Div. 824;

Wager v. Wager, 89 N. Y. 161; Mildeberger v. Franklin, 130 App. Div. 860; Pyle v. Pyle, 137 App. Div. 568; Matter of Farrell, 125 App. Div. 702; Bryan v. Cooper, 72 N. Y. 317.)

Henry A. Foster, for Louis H. Morris, respondent. Since the Revised Statutes of 1827-1828 it has not been and it is not law or equity of New York that if part of an unsold land poor residuary trust, consisting of realty which cannot be sold notwithstanding an imperative power of sale, fails to produce any income, the life beneficiary of the income of the residuary estate thereby becomes entitled to legal interest on the unsold portion, payable out of the corpus of the residue, in derogation of the remaindermen's rights. (Kingsland v. Murray, 133 N. Y. 170; Potter v. Gardner, 12 Wheat. 499; Patterson v. Vivian, 137 App. Div. 596; Matter of Osborne, 209 N. Y. 451; Gibbons v. Mahon, 136 U. S. 549; Matter of Harteau, 204 N. Y. 293; Thayer v. Burr, 201 N. Y. 155; Chester v. Buffalo Car Mfg. Co., 70 App. Div. 444; Matter of Rogers, 161 N. Y. 108; Cuthbert v. Chauvet, 136 N. Y. 326; Genet v. Hunt, 113 N. Y. 158; Lent v. Howard, 89 N. Y. 170; Douglas v. Cruger, 80 N. Y. 15; Matter of Kirby, 113 App. Div. 711.)

Abram I. Elkus, Charles P. Northrop and Wesley S. Sawyer, for Keith W. Morris et al., respondents. The complaint does not state a cause of action. (Patterson v. Vivian, 63 Misc. Rep. 389; 137 App. Div. 596; Bank of Niagara v. Talbot, 110 App. Div. 519; 184 N. Y. 576; Matter of Stanfield, 135 N. Y. 292; Matter of Kings County Trust Co., 141 App. Div. 43; Matter of Slocum, 169 N. Y. 153; Thorn v. Garner, 113 N. Y. 198; Bradner v. Faulkner, 12 N. Y. 472; Matter of Accounting of McGowan, 124 N. Y. 526; Matter of O'Hara, 19 Misc. Rep. 254; Hite v. Hite, 20 S. W. Rep. 778; Clifford v. Davis, 22 Ill. App. 316; Vickers v. Scott, 3 M. & K. 500.)

HISCOCK, J.— The complaint, which, under the decision of the Appellate Division, has been successfully attacked by demurrer as not stating a cause of action, alleges, amongst others, the following facts:

Mary G. Pinkney died in 1908. She left her surviving as her only heirs at law and next of kin a nephew, Thomas L. Watt, and two nieces, the defendant Grace Watt Thomas and the plaintiff, formerly Julia Morris. She also left a will which was duly admitted to probate and which, after making certain specific bequests which have been paid or have lapsed, contained the following material provisions:

"*Eighth.* I direct that all the rest and residue of my estate, both real and personal, be divided into four equal parts. * * * I give, devise and bequeath one other equal undivided fourth part of my said estate, both real and personal, to my executors hereinafter named upon the following trust, to invest and reinvest the said one-fourth part and pay over the interest or income thereof during her natural life to Julia Morris * * * and upon her death to distribute the same among the children of said Julia Morris, share and share alike." The remaining three equal parts of said residuary estate were devised and bequeathed respectively to two nephews and to and for the benefit of the defendant Grace Watt Thomas, one-half of the latter one-quarter in trust.

By a following clause, numbered ninth, said testatrix provided that in case either of said four beneficiaries should die before her leaving issue him or her surviving, the share of the one so dying should go to his or her children, share and share alike, and in case either of them should die before her without leaving issue, she did "give, devise and bequeath the share of the one so dying to the surviving brothers and sisters in equal parts or shares — the whole of such part or share as may then fall to the said Julia Morris, to be held in trust by my executors as hereinbefore provided."

By another following clause, numbered tenth, she gave to her executors power and authority to sell either at public or private sale all her real estate or any part thereof upon such terms as in their judgment they should deem proper and to execute proper conveyances thereof and "that they apply such portions of the proceeds as in their judgment they may deem proper to the payment of any taxes and assessments that may be liens upon said real estate or any part thereof, and to pay over the surplus that may not be required in their judgment for the above named purpose to (the other three beneficiaries above named and) the said Julia Morris * * * in the proportions mentioned in the Eighth and Ninth Clauses (above quoted), * * * the whole or such part or share as may then fall to the said Julia Morris to be held in trust by my executors as hereinbefore provided."

Said testatrix left personal property of the value of about \$700,000 and real estate of the value of about \$8,000,000. Practically all of the personal estate has been exhausted in the payment of expenses and of specific legacies and said real property as a whole has been, and the portion still remaining unsold is, unproductive, producing less income than was and is necessary to pay the carrying charges. From time to time down to October 21, 1912, sales thereof aggregating \$2,533,083.33 had been made and there was placed in the trust created for plaintiff's benefit between January 1, 1912, and June 15, 1912, the sum of \$775,000, being part of the proceeds of these sales.

In an action heretofore brought in the Supreme Court for construction of the will and to which all of the present parties or their privies were parties, it was adjudged that the power of sale contained in the will was an imperative one to sell all the real property of the testatrix except that specifically devised and that there was an equitable conversion of all her real property excepting that so specifically devised as of the time of her death.

Notwithstanding the provisions of the will and said judgment all of the amount paid into plaintiff's trust has been administered as principal, and although testatrix treated her in all respects as a daughter and frequently expressed her intention of providing for her in the most liberal manner, the plaintiff received no income under the trust for several years, and then only such as accrued on the proceeds of sales of real estate treated wholly as principal.

On these facts, in connection with others not necessary here to recapitulate, plaintiff demands that proceeds heretofore or hereafter realized from the sale of real estate and belonging to the trust in her favor shall be apportioned between interest going to her and principal going to remaindermen by taking in the case of each sale as of the date of the testatrix's decease such a sum as at six per cent interest with annual rests will produce the amount realized on said sale and that said principal sum so taken shall be treated as principal under the trust going to remaindermen and that the balance of the proceeds shall be regarded as income belonging to her. The difference between what is thus demanded and the method of treating proceeds of sales which thus far has been pursued measures and defines the important issue between the parties.

Stated more definitely and completely, the legal question presented by the complaint and demurrer is whether under a will creating a trust of unproductive real estate, income payable to a life beneficiary and remainder to others, with an imperative power of sale and equitable conversion of the real estate into personalty at the death of the testator, with actual sale and conversion accruing only after a considerable delay, the testator will be held to have intended that the proceeds thus and when realized should be apportioned between income payable from the time of his death to the life beneficiary and principal belonging to the remaindermen, or whether he is to be assumed to have intended that the proceeds thus realized should

be treated wholly as principal with income payable thereon to the life beneficiary only from the date of actual conversion.

There is no opportunity for controversy in respect of most of the conditions which present and leave open to us in this case the question as thus stated. If it be true that if the questions were undetermined, there might be some discussion as to the nature and extent of the power of sale and as to the equitable conversion of the real estate, it is conceded that the judgment construing the will which has been referred to is a binding adjudication upon the parties to this action. There is a claim, however, that the clause containing a power to sell real estate for payment of taxes which has been quoted has an effect superior to any principles of interpretation which might otherwise be applicable, and imposes upon us a construction of the will adverse to plaintiff's claims. Disposition of this claim will be reserved until after consideration of the will upon its other features.

The basis of plaintiff's contention for an apportionment of proceeds between income for her and principal for the remaindermen is the argument that ordinarily the life tenant is an object of more immediate and greater solicitude to the testator than remaindermen who may not even be in existence during his life, and that it is not to be assumed that a testator intends that a provision of income for a life beneficiary shall be rendered nugatory by delay, whether willful or otherwise, in the creation of a trust fund which is to produce the income, and that, therefore, there ought to be such an apportionment of proceeds on a conversion when finally realized as will give the life tenant such income as the testator must have intended. Applying this general argument to the concrete facts of this case it is urged that the plaintiff was the favorite niece of testatrix, treated by the latter as a daughter and promised liberal provision; that the remaindermen are more remote relations; that the will imperatively required conversion of the real estate in

order to make up the trust fund and worked an equitable conversion as of the date of the testatrix's death; that while it may have been assumed that the trustees or executors would be compelled to exercise discretion as to the time and manner of sale, it ought not to be held by the court that the testatrix intended that the first object of her bounty should be deprived of all benefit under the will to the advantage of the more remote remaindermen during the years that might necessarily be occupied in finding a market for \$8,000,000 worth of unproductive real estate; and hence there should be apportionment of proceeds when finally realized.

The question thus presented is one of construction of a will controlled by no statutory provision and to be settled by the authorities. It seems to me that such authorities so settle the question in favor of plaintiff.

In *Gibson v. Bott* (7 Vesey [1802], 89) the testator bequeathed to his executors his general residuary estate, including leasehold interests, upon trust, as soon as convenient after his death, to convert into money and invest the same and pay the income to his daughters in certain proportions. The leaseholds could not be sold for some time on account of defects in title.

Lord ELDON held that the proceeds constituted a fund for the benefit of the life tenants in trust, as well as for the remaindermen and should be apportioned between them. He said (p. 97): "As to the leasehold premises, that could not be sold, they cannot be considered otherwise than as property, which it was for the benefit of all parties to suffer to remain *in specie*; upon that, I think the plaintiffs may have interest upon the value from the death, for there is a consideration for that. The best decree in this cause will be to declare that the property to be converted has been converted in a reasonable time; that the persons entitled for life shall have the interest from that conversion; and as to the other leasehold premises, that it being for

the interest of all parties, that they should not be sold, a value shall be set upon them; and the persons entitled for life shall have interest at four per cent upon that value from the death of the testator."

In *Kilvington v. Gray* (2 Sim. & Stu. 396) it appeared that the testator had directed his residuary estate to be laid out in the purchase of the land as soon as a convenient purchase could be found in the county of York which upon a fair letting would produce a yearly rent equal to three and one-half per cent upon the amount of the purchase money, and in the meantime the interest of his residuary estate to be accumulated. Sir John LEACH, V. C., decided that the will did not give the trustees an indefinite time to convert the personalty and invest the proceeds in realty, as directed by the will, and, therefore, that the life tenant was entitled to interest on the testator's residuary personal estate from the end of one year after the testator's death.

In *Taylor v. Clark* (1 Hare [1841], 161; s. c., 66 Eng. Rep. 990) there was a contest between a beneficiary for life and the remaindermen. Among his assets, the testator owned an interest in a partnership in Portugal, which the executors were able to sell only after a lapse of some years. After giving certain specific legacies, the testator by his will gave the residue of his property to his executors to convert into money and invest in certain securities, and pay the income to his wife for life, and after her death, upon trust for the benefit of certain other persons with remainder over.

The life tenants in trust contended, as the plaintiff at bar does, that when the property was sold, the proceeds of the sale included principal and income and that they were entitled to an apportionment as between themselves and the remaindermen, and the court so held. Vice-Chancellor WIGRAM in deciding the case said (p. 167):

"To the argument of the parties interested in remainder

after the plaintiff's death, so far as it denies her right to any income in respect of the property in Portugal, until that property is gotten in and actually invested, I cannot accede. It is true, indeed, that the testator has not, in terms, given the tenant for life any benefit from his residuary bequest, except out of his property when converted into particular investments, and not until the property is so converted; but I cannot consider this alone to be an answer to the plaintiff's claim to have some income out of the property in Portugal, before it is gotten in and invested in the manner which the will directs. * * *

The court, in such cases, considers the interest of the legatees as the general and primary object of the testator, and treats his direction to convert and invest the property as a particular and secondary object—a mode, in fact, of carrying the primary object into effect, and nothing more. In many cases it would be impossible to get in the property within a reasonable time. In some, it could only be done at a ruinous loss to the estate. In others, different degrees of diligence used by trustees and executors would materially affect the interests of a legatee for life, and might (as Lord ELDON observed in *Sitwell v. Barnard*) equally affect the interest of those in remainder. To obviate these and other inconveniences, and to give effect, as near as may be to the testator's intention, the court acting upon a general rule (*Gibson v. Bott*, 7 Ves. 94; *Walker v. Shore*, 19 Ves. 387) feigns the property to be converted, as directed by the testator, at the end of one year from his death, and, at least from that time, gives to the tenant for life the precise income which would be produced if the property were actually so converted, and in its proper state of investment. By doing this the court gives the tenant for life as large an amount of income as the testator intended, and nothing more."

It was decided that the "property in Portugal must be considered as converted and placed in a proper state of investment at that time," *i. e.*, "a year after the testator's death," and that

the life tenant was entitled "to the precise income which would be produced if the property were actually converted, and in its proper state of investment." Income was directed to be paid on a fund based on the appraised value of the property the conversion of which was delayed, and the apportionment was granted irrespective of whether there should eventually actually be a gain or loss by reason of the delay.

In *Wilkinson v. Duncan* (23 Beav. [1857] 469) the testator was entitled to one-sixth of about £23,000 in reversion expectant on the deaths of two others. The trustees under the testator's will having a discretion allowed the reversionary interest to remain unsold for nineteen years, when it fell into possession.

ROMILLY, J., in decreeing an apportionment of the fund in favor of the life tenant under said testator's will, said, at page 472: "The trustees delayed to sell the reversion until it had fallen into possession, because they were of opinion, that by so doing, they would, in the end, produce a larger amount to the estate of the testator. They acted properly in so doing, but they ought not thereby to injure one of the legatees of that trust fund for the benefit of others, and it is to be presumed that they in no way intended to do so. The tenant for life has received nothing for interest down to the present time; but if the reversion had been sold he would then have received the interest on the amount of the purchase money; and if the period when the reversion fell in could have been foreseen, and the reversion could have been sold at a fair price, it ought, with the accumulated interest upon it, to have realized the full amount of the fund as it stands at present. I am of opinion that the tenant for life is entitled to have paid to him, in respect of interest, out of the capital of the fund now realized, the amount which he would have so received."

In *Yates v. Yates* (28 Beavan [1866], 637) the testator left certain unimproved real estate to trustees for the benefit of his

wife for her life with remainders but with "absolute discretion" to his trustees as to whether they should or should not sell at all. This discretion was so broad that the court said of it "They (the trustees) are not bound to exercise their power and sell at all." The court held that as the trustees were not required to sell at all the case was taken out of the general rule, and even though the property had been wholly unproductive, the life tenant on the sale thereof could not have an apportionment of the selling price. But the court, at page 639, stated the general rule as follows:

"The principle of the court, I apprehend to be quite clear. Where a testator gives property to trustees, with an absolute trust for conversion, and with a discretion as to the time at which the conversion shall take place, if, from any cause whatever, arising from the exercise of the discretion and judgment of the trustees, the conversion is delayed, then the tenant for life is not to be prejudiced by that delay, but is to have the same benefit as if the conversion had taken place within a reasonable time from the death of the testator, which is usually fixed at twelve months from that period." (And see *Tucker v. Boswell*, 5 Beav. 607; *Kilvington v. Gray*, 2 Sim. & Stu. 396. See, also *Sitwell v. Bernard*, 6 Vesey, 520.)

Sargent v. Sargent (103 Mass. 297) involved a case where the will directed that certain bonds should be sold as soon as possible after the testator's death and the avails paid over to a trustee in trust, to pay the interest thereof to one who appears to have been a daughter-in-law of the testator, and the principal at her death to grandchildren. There was delay in converting the bonds during which various coupons fell due. It was held that the amount of these coupons was payable as income to the life beneficiary, and it was written: "In the case of a bequest of a residue in trust to be sold as soon as may be and invested in a particular kind of security, and the income paid to one person for life, and then the principal to others, without any

direction that such investment shall include intervening income by way of accumulation, it is now, after much variety and conflict of opinion, well settled in England, that the tenant for life is entitled to income from the death of the testator, that the conversion from one form of security to another, if not made sooner, is to be taken as if made at the end of one year from the testator's death; and that the tenant for life is to receive the income computed accordingly from that time, and the income of the actual investment for the first year, if in public funds or such other securities as a trustee might lawfully invest in."

In *Edwards v. Edwards* (183 Mass. 581) it appeared that the testator had given his property to trustees, with power "to invest and reinvest the same at their discretion, in such securities as the laws of this Commonwealth allow savings banks to invest their funds in," and then provided that the net income, etc., should be paid to his wife, for life, with remainder over, except that \$100 a month should be paid to the testator's son and daughter-in-law for life. The most valuable part of the real estate was unproductive land on Huntington avenue, Boston. This property did not produce sufficient income to pay the taxes and expenses, and was not sold until more than three years after testator's death. The delay in selling was not due to the fault of anybody. The life beneficiary claimed that the fund produced by the sale of the Huntington avenue real estate should be apportioned. It was held that the fund as actually received by the trustees should be apportioned by ascertaining what sum would have been sufficient if invested by the trustees immediately after the death of the testator, to produce, with the income which they reasonably could have obtained from it, the sum in the hands of the trustees as the net proceeds of the lands on Huntington avenue after deducting their disbursements on account of the property. That sum was to be held as principal, and the remainder was to be paid over as income.

Chief Judge KNOWLTON said (pp. 583, 585): "Under language like that of this will, which gives the trustees all the property, real and personal, and does not indicate an intention that the time for establishing the fund shall be postponed, and which gives to a life tenant the annual income, it is well settled law in this Commonwealth, that the income is to be computed from the time of the testator's death. (Authorities.) In the present case the testator obviously intended that the entire property should be converted into one fund, and that the unproductive and speculative investments which he had at the time of his death should be changed without unreasonable delay. Much of the property held on margins was not of such a kind 'as the laws of this Commonwealth allow savings banks to invest their funds in,' and the land on Huntington avenue was not in a condition to be held as a permanent investment. It was, therefore, the duty of the trustees to convert this property into an income-producing fund, and this they did according to their best judgment and discretion. The testator is presumed to have expected that some time would be required to accomplish this. At the same time, he is presumed to have intended that the rights of the life tenant to income should be ascertained on the creation of the fund, as if the fund had come into existence immediately after his death. This is in accordance with the rule repeatedly stated by this court. (*Kinmonth v. Brigham*, 5 Allen, 270, 278; *Sargent v. Sargent*, 103 Mass. 297; *Westcott v. Nickerson*, 120 Mass. 410; *Mudge v. Parker*, 139 Mass. 153.) The rule is applicable as well when the delay in converting the property is necessary as when it is caused by the voluntary act or default of the trustees. (*Loring v. Massachusetts Horticultural Society*, 171 Mass. 401, 404.) * * * We are to deal with the income which could have been obtained by the trustees if the fund had been ready for investment and had been invested immediately after the death of the testator. The failure to invest it then was not the fault of anybody, and

we are not called upon to allow interest as interest, but only to ascertain the probable income."

Various attempts are made to distinguish the foregoing case from the one at bar, and of which two will be briefly considered.

It is said that the unimproved real estate involved in said case after a delay of some years was sold at a large advance over its inventory value, and the question before the court related "to an apportionment of the proceeds between the widow and the remainderman," and which was entirely different than the question before us. It may be conceded that if the question under consideration was the one merely how an increment in value of trust property should be divided between life tenant and remainderman the case would not be authority here. It does not appear to me, however, that such was the question being considered, but rather that it was being directly decided whether on the conversion of unproductive property into a trust fund the proceeds should be apportioned between principal and income covering a period when there had been no actual income, and that this question was considered and decided entirely irrespective of the feature that the real property was finally converted at a larger or smaller price than that at which it had been inventoried.

It is also said that the decision in the Edwards case is based on a statute which provides, "When an annuity * * * or income * * * of property real or personal is given by will * * * in trust for the benefit of a person for life such person shall be entitled to receive and enjoy the same from and after the decease of the testator unless it is otherwise provided in such will or testament." An examination, however, of the Edwards and Sargent cases and of the case of Ayer v. Ayer (128 Mass. 575) discloses that the rule which was being laid down was not based on any statute but was a rule of

law with which it was said that the statute above quoted was in harmony.

Williamson v. Williamson (6 Paige Ch. 298, 304) involved the question as of what date interest should be paid to the widow on a bequest to her of the use of the residuary estate during life or widowhood. The conclusion was reached that in the case of a bequest of a life estate in a residuary fund where no time is prescribed for the commencement of the interest or enjoyment of the use or income the legatee for life is entitled to the interest or income of the clear residue as afterwards ascertained to be computed from the time of the death of the testator. In the discussion of this question the chancellor wrote what seems to be pertinent here. "All the cases which appear to conflict with this rule, * * * will be found to be cases in which the testator had directed one species of property to be converted into another, or the residuary fund to be invested in a particular manner, and had then given a life estate in the fund as thus converted or invested. In such cases it appears to be consistent with the will of the testator to consider the life interest as commencing when the conversion takes place, * * * either within the year or at the expiration of that time. But as a year is considered a reasonable time for the executor to comply with the testator's directions as to the conversion * * * the legatee for life cannot be kept out of the interest or income beyond that period."

Rodman v. Fincke (68 N. Y. 239, 244, 245) involved the consideration of a case where the will devised certain real estate to trustees to sell and invest the proceeds for the benefit of testator's children with remainder over, and with the further provision that if the proceeds of the real estate should be less than a certain amount such deficit should be made up from the testator's personal estate. After several years the real estate was sold for a sum much less than the amount fixed for the trust fund. Thereupon an action was brought in behalf

of the life beneficiaries asking that they be paid out of the residuary estate the balance necessary to make the prescribed amount of the trust fund and interest on such balance for the period intervening the testator's death and the sale of the real estate, and also from said residuary fund an amount as income on the proceeds of the real estate sold during said intervening period. It will thus be noted that one of the prayers was not that the proceeds of the real estate sold should be apportioned between income for life tenants and principal for remaindermen, but that such income should be paid to the life tenant out of an entirely different fund. It was held that there was nothing in the will which authorized this to be done. But it was said: "If the *cestui que trust* for life have, by the delay in the sale, sustained any loss of interest on the proceeds, that is a matter between them and the trustees or remaindermen," and then Judge RAPALLO writes: "Where a testator gives property to trustees with an absolute trust for conversion, and with a discretion as to the time at which the conversion shall take place, if from any cause whatever, arising from the discretion and judgment of the trustees, the conversion is delayed, then the tenant for life is not to be prejudiced by this delay, but is to have the same benefit as if the conversion had taken place within a reasonable time from the death of the testator, which is usually fixed at twelve months from that period."

Of course what is thus written fits the present case, but again attempt is made to destroy this authority also by various criticisms. It is suggested that what was said was a dictum. I do not so regard it. The claim was being made to certain relief by way of allowance from the residuary estate of income to the life beneficiary on the proceeds of a deferred sale of real estate directed to be converted for the purpose of creating a trust fund. It was in effect held that there might be an apportionment between income and principal of the proceeds of the particular real estate sold, but that that rule did not sustain

the claim being then made. That appears to have been a pertinent and appropriate line of discussion for the court.

Next it is said that Judge RAPALLO based his statement of the rule here invoked on the two English cases of *Yates v. Yates* (28 Beavan, 637) and *Kilvington v. Gray* (2 Sim. & Stu. 396) (already referred to herein), and that the latter case was not applicable and that the former one had been in effect overruled by the later cases of *Searle v. Baker* (L. R. [2 Ch. Div. 1900] 829) and *Wilson v. Oliver* (L. R. [2 Ch. 1908] 74). I am not able to agree with the view thus taken. I think the *Kilvington* case does sustain what was written in the *Rodman* case and that the *Yates* case cannot be regarded as having been overruled by the *Searle* and *Wilson* cases. It is true that in the *Searle* case Judge KEKEWICH did say that *if* the master of the rolls in the *Yates* case did intend to lay down a certain rule, not at all material in this case or in the *Searle* case, he was wrong, but this observation seems rather too hypothetical and irrelevant to have the effect of overruling the case referred to. The *Wilson* case simply followed the *Searle* case on the point which was really involved and which as already sufficiently indicated was entirely different than the one being discussed by Judge RAPALLO and involved here. Therefore, it seems to me that the *Rodman* case is substantially an authority for the view urged by appellant. (See, also, as perhaps tending to support her position, *Roosevelt v. Roosevelt*, 5 Redf. 264 and 122; *Lawrence v. Embree*, 3 Bradf. 364; *Matter of Kendall*, 4 Dem. 133.)

These authorities, which are not overthrown by any of the decisions called to our attention, in my opinion sustain the construction and administration of the will contended for by plaintiff unless the claim in behalf of defendants already referred to that a particular provision has a controlling, contrary effect is well founded and that claim will now be considered.

The clause which was thought by the Appellate Division to have this important effect is the tenth one whereby after giving a power of sale to the executors, it was provided, "that they apply such portions of the proceeds (of sales) as in their judgment they may deem proper to the payment of any taxes and assessments that may be liens upon said real estate or any part thereof and to pay over the surplus that may not be required in their judgment for the above purpose to the said * * * Julia Morris (and the three other beneficiaries named with her) in the proportions mentioned in the eighth and ninth clauses of this my will, the whole of such part or share as may then fall to the said Julia Morris to be held in trust by my executors as hereinbefore provided."

Construing this clause it was reasoned by the Appellate Division that a power of sale was given to the identical persons named in the will in their capacity as executors and not as trustees, and that as executors they were empowered from time to time to sell so much of the property devised to them as trustees as seemed best and after paying taxes and assessments pay over to themselves as trustees any remaining surplus; that the discretion with which the executors were vested permitted them to sell from time to time so much only as might at the utmost be necessary to pay the taxes and assessments on the whole; that viewed in this light the only right of the trustees was to receive for the plaintiff's account such surplus as might remain after taxes and assessments had been paid, and that until such surplus was paid over there could be no income for plaintiff to enjoy. It was also reasoned that no different result would be reached if the power of sale was construed to be mandatory and immediate, for in that event all the trustees would be entitled to receive was the surplus after payment of taxes, and until such surplus was obtained by the execution of the power there could be no income to which plaintiff would be entitled. Thus as I understand it, two propositions were

asserted. The first one that there was a power to sell only for payment of taxes which would give plaintiff an interest only in any surplus that might happen to be produced in that manner; the second one, that even though there was an imperative power of sale it was to be executed by the executors, and plaintiff would not have any right to income until the "surplus" was actually realized and paid over to the trustees. In answer to the first proposition, it seems to me that we are barred from debating whether the general scheme of the will contained in preceding clauses whereby part of the residuary real property was conveyed upon the trust to "invest and reinvest the said * * * part and pay over the interest or income" to Mrs. Morris, thereby implying a power of sale, was destroyed or cut down to a mere discretionary power to sell for payment of taxes. It has been adjudicated that there was an imperative power of sale which worked an equitable conversion of all the residuary property at the date of testatrix's decease.

In my opinion this tax paying provision upon which so much stress has been laid was intended to give the power to sell land, pending the general conversion, for the purpose of raising money with which to pay taxes on *all* the property as well as those resting on the *particular piece* which was sold. The fact that the power of sale was imperative did not deprive the trustees or executors of some discretion as to time and manner of sale or insure against delay in conversion during which taxes would accumulate. (Graham v. Livingston, 7 Hun, 11, 14; Stagg v. Jackson, 1 N. Y. 206, 212.)

Neither do I think that the assumption that the real property devised to trustees was to be sold by them acting as executors and the proceeds paid to them in the former capacity by themselves acting in the latter capacity establishes the proposition for the purposes of this action that "until such surplus was obtained by the execution of the power there could be no

income to which plaintiff would be entitled." Of course, there would be no income actually realized on the principal of the trust fund in the ordinary manner until the proceeds of the sales were received, but that is not the proposition involved here. The property was devised to the trustees for the purposes of the trust. The provision for converting it into personalty was imperative, and the question is shall the proceeds when actually realized be so apportioned as to give the life tenant a sum as income from the time when the property is deemed to have been converted and during the period of deferred actual conversion, and thus carry out the supposed intent of the testatrix. In my opinion this question is not decided by the somewhat illusory consideration that the imperative command of the will was executed by a set of persons acting in one capacity or the other or by the fact that there was no actual income to be enjoyed by plaintiff until the proceeds of the sale were received by the trustees. The latter fact is the very basis for applying the rule in such a case and giving to the life tenant a sum *as* income during the period when he would have actually received income if the assumed intentions of the testatrix had prevailed.

Regarding as settled in favor of the plaintiff the main proposition that the proceeds arising from the sales of real estate should be in part apportioned to income for the period intervening the testatrix's death and the sale, two minor questions require consideration.

The first one is, shall this intervening period for which income is to be apportioned be deemed to commence at the date of testatrix's decease or one year thereafter. I think the ordinary rule is that where a conversion of property is required to form the trust fund income will not commence until one year after the decease unless the conversion has actually been accomplished sooner. The query arises in this case, however, whether this general rule is affected by the prior adjudication

that the will "worked and effected at the time of her (the testatrix's) death an equitable conversion into personal property of all of the real property." I think it is so affected. When the doctrine of equitable conversion is held to be applicable as in the present case operating to change real estate into personalty, it is followed out for all purposes of the will. (*Moncrief v. Ross*, 50 N. Y. 431, 436; *Delafield v. Barlow*, 107 N. Y. 535, 540; *Graham v. Livingston*, 7 Hun, 11, 14; *Stagg v. Jackson*, 1 N. Y. 206, 212; *Hood v. Hood*, 85 N. Y. 561, 570; *Finley v. Bent*, 95 N. Y. 364, 367.) I, therefore, see no reason why the doctrine of a conversion at the time of the testator's death should not be applied in aid of the rule now being invoked as well as for other purposes of the will.

Secondly, plaintiff urges that in applying the rule of apportionment between income and principal, income should be figured at the rate of six per cent. I doubt this. Such income should not be figured at a greater rate than could have been realized by the trustees on a proper investment of funds if they were actually in existence, and in apportioning the income it will be the duty of the trial court to determine at what rate of interest this income should be computed. (*Edwards v. Edwards*, *supra*.)

Lastly, it is urged as a bar to and defect in the cause of action stated in the complaint that adequate relief could be obtained in the Surrogate's Court and that, therefore, the Supreme Court should not entertain jurisdiction of the action. This argument seems to be made in this court for the first time and it is one to be addressed to the Supreme Court. That court under ordinary circumstances will refuse to entertain jurisdiction of an action seeking relief which can be fully administered on an accounting, for instance, in Surrogate's Court. But the question whether it will thus refuse to entertain jurisdiction is one which largely rests in its discretion, and, therefore, should be addressed to it certainly in the first instance. (*Matter of Smith*,

120 App. Div. 199; *Anderson v. Anderson*, 112 N. Y. 104, 109; *Wager v. Wager*, 89 N. Y. 161, 168; *Bankers' Surety Co. v. Meyer*, 205 N. Y. 219, 224.)

In accordance with these views the order of the Appellate Division should be reversed and interlocutory judgment of the Special Term affirmed and the question certified to us answered in the affirmative, with costs to the appellant in this court and in the Appellate Division.

WILLARD BARTLETT, Ch. J., CHASE, CUDDEBACK, HOGAN, MILLER and SEABURY, JJ., concur.

Order reversed, etc.

BRIDGET REYNOLDS and MARY MORRIS, Respondents, v. JOHN REYNOLDS, Individually and as Executor, etc., of JOHN MCGUIRE, Deceased, Respondent, Impleaded with MARGARET SHEARAN and Others, Appellants.

(*Supreme Court, Appellate Division, Second Department, April 9, 1915.*)

WILL—TRUST—FAILURE TO NAME BENEFICIARIES—ACTION TO IMPRESS TRUST UPON PERSONAL PROPERTY—EVIDENCE *dehors* WILL IDENTIFY BENEFICIARIES—DECREE OF SURROGATE DECLARING TRUST PROVISION INVALID NOT RES ADJUDICATA.

Where, in an action by two sisters of the testator to impress a trust upon personal property under a provision in the will by which the testator gave all his personal property to his executor in trust, to dispose of as he had "advised and directed him to do giving him full power and authority," it appears from evidence *dehors* the will that the testator, prior to making the will, had expressly told the executor that he desired to have his personal property divided in equal shares among his two sisters, and that if he would so divide the property he would make a will, a judgment in favor of the plaintiff should be affirmed.

The fact that the Surrogate, when the will was offered for probate, declared the trust provision void, is not conclusive upon the plaintiffs in this action.

APPEAL by the defendants, Margaret Shearan and others, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 16th day of December, 1914, upon the decision of the court after a trial at the Kings County Special Term.

Michael J. Egan and L. J. Morrison, for the appellants.

Henry F. Cochrane, for the respondents.

RICH, J.—The defendants, with the exception of John Reynolds, appeal from a judgment of the Special Term in favor of the plaintiffs, in an action brought to impress a trust upon personal property, under the provisions of the 6th paragraph of the will of Reverend John McGuire, deceased, by which such property was bequeathed to his executor, the defendant Reynolds, in the following language:

"Item Sixth. I do hereby give and bequeath to my said Executor all of the personal property (of) which I may die possessed and which I may own at the time of my death in trust, however, and for the purposes of paying out and disposing of same as I have advised and directed him to do giving him full power and authority as my executor to fully sign, execute and deliver any and all releases, satisfactions of mortgages and other papers necessary for the fully carrying out of the directions so given and to be of full power and effect as though I was personally present and to acknowledge any and all necessary papers in the matter of carrying out the trust reposed in him."

The learned trial court has found and the evidence is sufficient to sustain his findings:

"IV. That about two weeks prior to his death the said John McGuire stated and declared to the said John Reynolds that he was desirous of making a will.

“ V. That at various times thereafter the said John McGuire stated and declared that he intended to make a will, and further stated and represented to the said John Reynolds that he had a large amount of personal property that he desired to dispose of in a certain manner.

“ VI. That thereafter and prior to the execution of his will, the said John McGuire stated and represented to the said John Reynolds that the disposition which he desired to make of his personal property was to give the same in equal shares to his sisters, Bridget Reynolds and Mary Morris, and he further stated and represented to the said John Reynolds that if he would undertake to dispose of the said personal property in equal shares between the said Bridget Reynolds and Mary Morris, he would make a will, by the terms of which he would leave the said personal estate to the said John Reynolds, in trust, to pay out the same according to the directions which he had given to him, to divide the same equally between the said Bridget Reynolds and Mary Morris.

“ VII. That the said John Reynolds promised and agreed to and with the said John McGuire, that if he, the said John McGuire, would make such a will, that he would carry out the directions of the said John McGuire, and pay out and dispose of the property bequeathed to him in equal shares between the said Bridget Reynolds and Mary Morris.

“ VIII. That thereafter, and after the making of the said promise and agreement by the said John Reynolds, and in reliance thereon, the said John McGuire, on the 29th day of April, 1912, made and executed his will in writing, wherein and whereby he appointed said John Reynolds his executor and trustee, and bequeathed him all of his personal property, in trust, to be paid out and disposed of by him according to directions given the said John Reynolds by the said John McGuire to divide the same equally between the said Bridget Reynolds and Mary Morris.

"IX. That thereafter the plaintiffs duly demanded that the said John Reynolds carry out and perform his promise and agreement made to and with the said John McGuire to pay out and distribute the personal property of the said John McGuire to the plaintiffs in equal shares, which demand has been refused by the said John Reynolds."

No exceptions to the findings were filed by the appellants. The plaintiffs are sisters of the decedent, residing in Ireland, and are the sisters to whom he referred in his conversations with Reynolds. In addition to these sisters, the testator left him surviving, as his heirs at law and next of kin, Thomas McGuire, a brother, since deceased, the defendants Margaret Shearan, a sister, Elizabeth Rowe, Thomas McGuire, John McGuire and Philip McGuire, children of a deceased brother, Patrick McGuire. The defendant Ellen McGuire is the administratrix of the deceased Thomas McGuire, and upon her appointment was duly substituted as a party defendant in his place. Of his brother Thomas and his sister Margaret Shearan, the deceased while planning the disposition of his property said: "No, I won't acknowledge them at all." Mr. Orwell, the lawyer who prepared the will, took it to the house, and in the presence of Reynolds read it to the testator. When he read the 6th clause he asked who was the beneficiary, and the deceased replied, pointing to Reynolds, "He knows. * * * He will carry out my instructions, he will do it." Reynolds does not appeal.

It is contended that the case at bar is controlled by the rule that a testamentary disposition which is so indefinite that the intention of the testator cannot be ascertained from the language of the instrument is void and cannot be made valid by any oral testimony or by any written instrument which is not of a probative character, and that for that reason the trust in the will under consideration fails and as to the property included in the 6th subdivision of the will the deceased died

intestate. The answer to this contention is that the trust created by the will is constructive, arising by implication of law, to carry into effect the expressed intention of the testator and promise of the legatee, which induced the making of the will, and equity will intervene, even in the absence of fraud, when it is necessary to carry out and effectuate the intention of the testator. (Jay v. Lee, 41 Misc. Rep. 13; Amherst College v. Ritch, 151 N. Y. 282; Matter of O'Hara, 95 id. 403, which recognized the rule, but denied its enforcement because the trust attempted to be created violated the statute against perpetuity; Ahrens v. Jones, 169 N. Y. 555, 561; Rutherford v. Carpenter, 134 App. Div. 881, 888; Golland v. Golland, 84 Misc. Rep. 299; Erdman v. Meyer, 52 id. 256.)

The trust is perfect and complete, with the exception that it does not name the beneficiaries. This does not invalidate the trust. As was said in Jay v. Lee (*supra*): "The designation here is of persons whose names the testator had given to the trustees before making her will. So long as the fact exists that she gave them the names, it does not matter whether it was done orally or in writing. * * * There seems to be no doubt that evidence *dehors* the will may be resorted to to identify the beneficiaries designated by the will. It is true that a bequest can only be made by a will. But the bequest here is made by the will, *i e.*, to the trustees. The evidence *dehors* is not to make a bequest, but to ascertain and identify the beneficiaries designated by the trust clause of the will." This rule of law is supported by decisions in many other jurisdictions, among others the following: Curdy v. Berton (79 Cal. 420; 5 L. R. A. 189); Matter of Fleetwood, Sidgreaves v. Brewer (L. R. 15 Ch. Div. 594); Pring v. Pring (2 Vern. 99); Matter of Spencer's Will (57 L. T. [N. S.] 519); Podmore v. Gunning (7 Sim. 644); Attorney-General v. Dillon (13 Ir. Ch. 127); Irvine v. Sullivan (L. R. 8 Eq. 673).

Evidence *dehors* the will was competent to establish that the

plaintiffs were the beneficiaries named and intended by the testator as the recipients of his bounty, and this being so, the trust is valid and enforceable in equity. The cases cited by the appellants to sustain their contention upon this point differ in their material facts from those presented by the case at bar and are not authorities which apply to or control the disposition of this appeal. The will was construed by the surrogate under the provisions of section 2624 of the Code of Civil Procedure* when offered for probate, all of the heirs and next of kin having been cited, and its 6th subdivision was decreed void, and it was decided that as to the personal property included in that subdivision the testator died intestate, and the same should be distributed under and in accordance with the provisions of the Statute of Distribution.† It is now contended that such adjudication is conclusive upon the plaintiffs and *res adjudicata* upon the issues of fact and questions of law presented by this action. The court at Special Term overruled this contention upon the authority of *Fairchild v. Edson* (154 N. Y. 199), and he was clearly right.

This is not an action to construe the will, but one to declare and enforce a trust created by it. The will is not assailed. The question presented now was not presented to the learned surrogate, who at the time of the probate was without equitable jurisdiction. The only questions within his jurisdiction were the testamentary capacity of the deceased and undue or improper influences exerted over and upon him. While it is true that, as an incident of the probate, he could construe any part of the will if the parties so desired, his consideration was limited by statute and did not include equitable operation. The distinction between the questions raised in the two classes of cases is considered and explained in *Edson v. Bartow* (10

* Now Code Civ. Proc., § 2615, as amd. by Laws of 1914, chap. 443.— [REP.]

† See Decedent Estate Law (Consol. Laws, chap. 13; Laws of 1909, chap. 18), § 98, as amd.— [REP.]

App. Div. 104, 108; *affd.*, 154 N. Y. 199), and in *Matter of Keleman* (126 *id.* 73). In *Matter of O'Hara* (*supra*) the question was whether an adjudication by a surrogate admitting a will to probate and decreeing its provisions valid was a bar to an action to annul the bequest or establish a trust which, failing as to the intended beneficiaries, should benefit those who would otherwise have taken by descent or distribution. The adjudication of the surrogate was that the trust was invalid because of its violation of the statute suspending the power of alienation. (See Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 11.) As I have said, no exceptions were filed, and the exceptions taken on the trial are not argued. I have considered them, however, and find no prejudicial errors.

I advise, therefore, that the judgment be affirmed, with costs.

JENKS, P. J., BURR and THOMAS, JJ., concurred; STAPLETON, J., not voting.

Judgment affirmed, with costs.

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of a Trust Created by the 12th Paragraph of the Will of AMBROSE M. MCGREGOR, Deceased, for the Benefit of TOOTIE MCGREGOR TERRY, Respondent, *v.* MARSHALL O. TERRY and FRANK L. HALL, as Executors, etc., of TOOTIE MCGREGOR TERRY, Deceased, and Others, Appellants, Impleaded with UNION TRUST COMPANY OF NEW YORK, as Trustee of a Trust Created by the 12th Paragraph of the Will of AMBROSE M. MCGREGOR, Deceased, for the Benefit of TOOTIE B. MCGREGOR, Afterwards TOOTIE MCGREGOR TERRY, Respondent, and THE CLEVELAND TRUST COMPANY, as Trustee of a Trust Created by the 6th Paragraph of the Will of AMBROSE M. MCGREGOR, Deceased, for the Benefit of AMBROSE MORRISON MCGREGOR, and Others, Defendants.

(Supreme Court, Appellate Division, Second Department, April 23, 1915.)

WILL CONSTRUED—TRUST FOR LIFE, WITH REMAINDERS TO TESTATOR'S WIDOW, SON, OR ISSUE OF SON, IF LIVING, AT HIS DEATH—WHEN COLLATERALS DO NOT SHARE IN RESIDUARY ESTATE—WHEN BEQUESTS NOT PAYABLE IN DUPLICATE FROM SEPARATE TRUST ESTATES—WHEN ISSUE OF DECEASED LEGATEES TAKE PER CAPITA.

A testator placed certain specific shares of stock in trust, income and profits therefrom to his wife for life, and by the same clause of his will he gave other shares of the stock to another trustee upon a similar trust, with a provision that upon the death of his wife the trusts should end and a portion of the corpus be paid to the testator's brothers and sisters then living in addition to specific sums bequeathed to them in another paragraph of the will, similar bequests being made to nieces and nephews. The clause of the will relating to the specific bequests provided that the issue of deceased brothers and sisters should take the share which their parents would have taken if living at the time of the testator's death, and the bequests to nieces and nephews provided that if they should not be living at the testator's death, their issue should receive the share the parent would receive. The will provided that on the termination of the trusts the balance should fall into the residuary estate which was then bequeathed to the testator's wife, if living at his death, or to his son should the wife be dead, and to the issue of the son,

if he had died, with a further provision that if the son died without issue, the residuary estate should go to the testator's heirs and next of kin living at his death.

Held, that as the wife survived her husband, after her death the surplus remaining after the payment of the specific legacies should be paid to her executors, and did not pass to the brothers and sisters of the testator, or to the issue of deceased brothers and sisters living at his death, for such construction avoids intestacy as to the surplus of the trust fund;

That the specific legacies should not be paid in full from each of the two trusts created by the testator, but one-half should be paid from one trust and one-half from the other, for the testator had precisely fixed the amount of each bequest;

That where the specific legatees died leaving issue, the latter took *per capita*, not *per stirpes*.

Under the will aforesaid the collateral relatives do not share in the residuary estate, if the testator's widow, or son, or the issue of a son, were living at his death, and hence such collaterals have no claim other than the specific bequests, where both the widow and the son survived.

APPEALS by the defendants, Marshall O. Terry and another, as executors, etc., and others, from parts of a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 8th day of July, 1914, upon the decision of the court after a trial at the Westchester Special Term.

The judgment construed the will of Ambrose M. McGregor, deceased, and the various appellants appeal from different parts thereof.

Ernest P. Hoes, for the appellants, executors of Tootie McGregor Terry, deceased.

Paul R. Towne, for the appellants, sisters and nephews and nieces of testator.

Charles W. McKelvey and William G. Barr, for the respondents.

STAPLETON, J.—The object of the plaintiff's action is a judicial construction of the will of Ambrose M. McGregor, deceased, in relation to clauses as to the meaning of which plaintiff professes to be in doubt. The plaintiff is a trustee of a trust created by the will. The defendants are the trustees of a similar trust; the executors named in the will of the testator's widow, now deceased; the executor of the will of the testator's son, now deceased; adult and infant collateral relatives of the deceased, who are legatees; and certain other persons, in whom we are not interested in the disposition of this appeal.

The testator died on the 31st day of October, 1900. His will was executed on the 27th day of January, 1897. A codicil was executed on January 20, 1899. The will was probated in this State, in the county of Westchester. The testator was survived by his widow, Tootie, and his son, Bradford. At the time of his death he had two brothers (John A. and Alexander H.) and three married sisters (Margaret J. Coleman, Mary A. Kendall and Jane Drake). The son Bradford died on the 7th day of September, 1902. He devised and bequeathed the bulk of his estate to his mother, the testator's widow. The widow of the testator remarried. Her husband's name is Terry. She died on the 17th day of August, 1912. She left a will in which she provided generously for her kin and her surviving husband, and in which she munificently endowed an Ohio corporation named "A. M. McGregor Home," having among its purposes the care of destitute aged men and women in the village of East Cleveland, Ohio.

Under the residuary clause of the will of Ambrose M. McGregor his widow received \$1,046,535.36 out of a total estate of \$1,512,274.51. The questions before the court involve the distribution by the two trustees of about \$273,000. The executors of the testator's widow have also contended that in any event a large part of the fund now held as principal includes the proceeds of certain subscription rights and stock

dividends and the proceeds of stock of subsidiary corporations received by the trustees in connection with shares of the Standard Oil Company of New Jersey, which proceeds constitute income due the estate of the widow. A motion on their behalf was granted, reserving their rights in these issues in view of the fact that such issues become immaterial under the construction of the will adopted by the trial court.

The testator's two brothers and his sister Margaret Coleman died before the death of the widow. The facts as to the testator's brothers and sisters and their descendants are manifested by this classification of persons and reference to periods of time:

Ambrose M. McGregor had two brothers and three sisters, all of whom survived him, viz.:

- | | |
|-----------------------------|---|
| 1. John A. McGregor | } Died prior to death of
Mrs. Terry. |
| 2. Alexander H. McGregor | |
| 3. Mrs. Margaret J. Coleman | |
| 4. Mrs. Mary Kendall | } Now living. |
| 5. Mrs. Jennie Drake | |

I. John A. McGregor died July 25, 1910 (Le Roy L. McGregor is executor). His descendants are:

1. Alanson A. McGregor.
2. Le Roy L. McGregor.

(1) John A. McGregor	} Both infants under fourteen.
(2) Joe F. McGregor	

II. Alexander H. McGregor died September 20, 1904 (Frank McK. Biggar is administrator). His descendants are:

1. Charles J. McGregor, died August 8, 1907 (Sara G. Mergenthal is executrix). His descendants are:

(1) Dorothy is over fourteen.	} Under fourteen.
(3) Mary Isabelle	
(2) Donald	

2. Ambrose Morrison McGregor. His descendant is:
 - (1) Robert McGregor — under fourteen.
 3. Mrs. Susie F. Durey. Her descendants are:
 - (1) Thane Durey — over fourteen.
 - (2) Donald Durey — under fourteen.
 - (3) Gerald Durey — under fourteen.
 4. Mrs. Elizabeth Isabelle Giles. Her descendant is:
 - (1) Marshall McG. Giles — under fourteen.
 5. Mrs. Nellie Kimball. No descendants.
 6. Mrs. Elsie Biggar. Her descendant is:
 - (1) Jane B. Biggar — under fourteen — (died after beginning of action, leaving her father, Frank McK. Biggar, her only next of kin).
 7. Mary L. McGregor (now Mrs. Warren).
(Mrs. Warren has one child, born December, 1913, who has no interest in the fund.)
 8. Margaret Mildred McGregor (now Mrs. Woodworth).
- III. Mrs. Margaret J. Coleman, died in February, 1912 (Margaret J. Coleman is administratrix). Her descendant is:
 - (1) Margaret J. Coleman.
- IV. Mrs. Mary A. Kendall. Her descendants are:
 - (1) John Alexander Kendall.
 - (2) William H. Kendall.
 - (3) Maude B. Kendall.
 - (4) Claude G. Kendall, died May 9, 1901, without issue (Mary A. Kendall is administratrix).
- V. Mrs. Jennie Drake. Her descendant is:
 - (1) Mrs. Edna M. Fontaine.
- The clauses of the will presented for construction, and which are of controlling importance, read:

“ Twelfth:

“ To the United States Trust Company of New York, I give the proceeds of One hundred and twenty-five shares of Stand-

ard Oil Trust Certificates, to have and to hold the same in trust, to invest and reinvest as trustee for my wife Tootie B. McGregor, for and during her natural life, to collect and receive the interest, income and profits thereof and to pay the same to my said wife Tootie B. McGregor, and to and for her use and benefit for and during her natural life; and unto the Union Trust Company of New York I give the proceeds of one hundred and twenty-five shares of Standard Oil Trust Certificates on the like trust for my said wife Tootie B. McGregor, to have and to hold in trust to invest and re-invest, collect and receive the interest income and profits thereof and pay the same to my said wife for her use and benefit, and for and during her natural life; and upon the death of my said wife said trusts shall cease, and then the funds thereof, principal and unexpended income and whatever may be in the trusts after deducting legal charges and commissions shall be paid and applied as follows — to each of my sisters and brothers then living in addition to the sum bequeathed to them each in the 3rd paragraph of my will I give the further sum of twenty-five hundred dollars, and unto each of my nieces and nephews the children of my said sisters and brothers, I give the further sum of One thousand dollars, such additional sums and legacies to go in like manner as in such 3rd paragraph provided in case of decease of any of such classes of legatees or of any of such legatees, the issue of any deceased to take the share its parent would have received; and in addition to the five thousand dollars in the sixth paragraph of this my will trustee for the benefit of Ambrose Morrison McGregor I give unto said Cleveland Trust Company upon the like trust the further sum of five thousand dollars, to invest and re-invest, collect and receive the interest, income and profits and pay and apply the same to and for the use and benefit of said Ambrose Morrison McGregor until he attains the age of thirty years, and then and so soon as he reaches his thirtieth year of his age to pay to him the principal

and any unexpended income, and in case of his death before he shall have reached his thirtieth year of age then to pay the principal and any accumulation of income to the next of kin of said Ambrose Morrison McGregor; And unto Ed. L. Barber, I give the sum of Sixty-five hundred dollars as a further legacy, and if he shall have died leaving issue, then the same shall be paid to such issue; and unto Adelaide Louise Barber, I give a further legacy of sixty-five hundred dollars if then living, and if she shall have died leaving issue then the same to be paid to such issue then living if any;

“ And unto James McCrosky, if then living at the time of such division of such funds, then I give a further legacy of Twenty-five hundred dollars.”

“ Fourteenth: ”

“ If after paying the additional legacies, at the termination of the trusts, as provided and directed by me, in the Twelfth paragraph of my will, there remain any balance and funds, over and above the sums required to meet, pay and discharge the said legacies, and the bequests and the trust provided for Ambrose Morrison McGregor, then such balances and surplus of such funds shall be paid and belong to my residuary estate, and pass thereafter according to the provisions hereinafter in respect to the residue of my estate.”

“ Sixteenth: ”

“ All the rest, residue and remainder (of) my property and estate, both real and personal, of every name and nature and wherever situated, I do hereby give, devise and bequeath unto my said wife Tootie B. McGregor, if living at the time of my decease; and in the event of the death of my wife prior to my decease, then I give, devise and bequeath said rest, residue and remainder of all my property and estate real and personal to my said son Bradford B. McGregor, and if he shall have died, also

prior to my decease, leaving issue living at the time of my decease, then I give, devise and bequeath the same to such issue of my said son then living if any, but if both he, my said son Bradford and my said wife Tootie B. McGregor, shall have died prior to my decease, and my said son Bradford shall leave no issue, living at the time of my decease, then I give, devise and bequeath all the said rest, residue and remainder of my property and estate, real and personal, aforesaid, unto my heirs at law and next of kin, living at the time of my decease."

The 3d paragraph of the will, to which reference is made in the 12th, is reproduced:

"Third:

"To each of my three sisters and two brothers, who may be living at the time of my decease, I give and bequeath the sum of Two Thousand Five Hundred Dollars, the issue of any deceased brother or sister of mine to take the share to which such deceased brother or sister of mine would have been entitled under this provision of my will if living at the time of my decease, and unto each of my nieces and nephews, the children of my said brothers and sisters, I give and bequeath the sum of One Thousand Dollars, and in case either of them shall have died leaving issue, then the issue of any of them so dying to receive the share the parent would have received if living at the time of my decease."

The questions presented for solution are:

1. Should the surplus remaining after the payment of the particular legacies mentioned in the 12th paragraph be paid to the executors of Tootie B. Terry, or does such surplus pass to the living brothers and sisters and the issue of deceased brothers and sisters of testator? The trustees contend and the trial court held that the former alternative presents the proper construction.

2. Should each legacy be paid in full from each trust, or

should such legacies be paid in the amount of one-half from one trust and one-half from the other trust? The trustees contend and the trial court held that the latter alternative presents the proper construction.

3. Where legatees have died leaving issue, do such issue take *per capita* or *per stirpes*? The trustees contend and the trial court held that such issue take *per capita*.

We approve the decision of the learned trial court in the three instances. As to the second question we are content to say that in the words used by the testator there is no foundation for the claim that the demonstrative legacies should be duplicated. He made a precise fixation of the sum of his benefaction. To support our affirmance of the learned trial court's decision of the third question it is sufficient to cite *Schmidt v. Jewett* (195 N. Y. 486); *Soper v. Brown* (136 id. 244). In recording our affirmance of the learned trial court's decision on the first question a statement may be desirable. The construction of the trial court did not overstep the bounds of interpretation and invade the domain of will making. The construction gave effect to the intent of the testator, plainly and unequivocally expressed; the intent not being in contravention of a statute or of public policy. It favored the vesting of the remainder. It avoided intestacy as to the surplus of the trust fund. The result has the approval of authority. (*Cammann v. Bailey*, 210 N. Y. 19, 30; *Salter v. Drowne*, 205 id. 204, 212; *Herzog v. Title Guarantee & Trust Co.*, 177 id. 86, 92; *Haug v. Schumacher*, 166 id. 506, 513.) By the 14th clause it is definitely provided that the surplus of the trust fund created by the 12th clause, over and above the amounts of the legacies to collateral relatives, shall "be paid and belong to my residuary estate, and pass thereafter according to the provisions hereinafter in respect to the residue of my estate." The meaning of these words is plain. The collateral relatives do not assert that this surplus was not disposed of under the

residuary clause. Their contention is that they are the residuary legatees. By the 16th or residuary clause of his will the testator gives all of his residuary estate, "of every name and nature," to his widow "if living at the time of my decease." The collateral relatives are not to participate in the residuary estate if the widow or his son or the issue of his son are living at the time of testator's death. The widow and the son lived after him. The provisions of the residuary clause are substitutional, one person or class being substituted for another. The determinative event in each case is the death of the testator, none other being expressed or implied. Each person or class takes all or none of the residue. It is not convincing to suggest that the testator must have meant something other than his words plainly import upon the assumption that it is an incongruity intolerable in law for the life beneficiary of a trust, the funds of which by the terms of the will and codicil may be invested in securities of fluctuating value, to have a vested remainder in the surplus of the corpus of the trust fund after the payment of demonstrative legacies large in amount to legatees uncertain in number. (*Doane v. Mercantile Trust Co.*, 160 N. Y. 494; *Riker v. Cornwell*, 113 id. 115, 127; *Brown v. Richter*, 25 App. Div. 239; *Matter of Asch*, 75 id. 486, 495; *Connolly v. Connolly*, 122 id. 492, 495.)

The cases upon which the collateral relatives rely are distinguishable because of the peculiar language of the wills involved, and the application of a rule inapplicable in the case at bar.

In *Delaney v. McCormick* (25 Hun, 574; *affd.*, 88 N. Y. 174) the will contained no words of gift in relation to the property in question, and the court applied the rule that where there is no language importing a gift except in the direction to convert real estate into money and then make distribution, time is annexed to the substance of the gift and the vesting is postponed.

In *Salter v. Drowne* (*supra*, 215) the court's decision is

epitomized in this paragraph: "If, instead of holding as we do in this case that the intent of the testatrix as shown by her will was to postpone any possible vesting of the corpus of the trusts until the death of her daughter, we were in doubt about her intention, the rule to be applied in construing the will in this State is that where a gift arises from a direction to divide or convey the trust property among a specified class of persons and such division or conveyance is contingent and dependent upon the happening of one or more uncertain events the gift does not vest until the time for distribution or conveyance arises."

In the 10th clause of the will before us, when the testator intended to attach a future condition or contingency to the substance of the gift, he was reasonably and substantially accurate in the expression of that intention. The clause reads:

"To the United States Trust Company of New York, I give the proceeds of One hundred and twenty-five shares of Standard Oil Certificates, to have and to hold, in trust, to invest and re-invest, to receive the interest, income and profits, and pay the same to my said son, Bradford B. McGregor, and to and for the use and benefit of my said son Bradford B. McGregor, for and during his natural life, and upon his decease, to pay over the principal and any unexpended income to the issue of my said son Bradford, and in the event of his death leaving no issue, then to pay the same to my next of kin then living." (Salter v. Drowne, *supra*, 210.)

The learned counsel for the collateral relatives suggests that "the Fourteenth paragraph was an afterthought, inserted after the Will had been drafted; and, because the person who drew this Will did not in the Twelfth paragraph, as in the Tenth and Eleventh paragraphs, go on and make a complete disposition of the *corpus* of the Trust fund, but attempted to dispose of it by making its ultimate disposition pass under the residuary clause following," etc.

The adoption of this hypothesis would lead us into the boundless realm of imagination—a journey to be avoided by those engaged in the prosaic work of interpreting written instruments.

We think the construction of the learned trial court as to the ownership of the surplus of the fund we have been considering was compelled by the plain language of the will, and that it is in harmony with the entire testamentary scheme of the testator.

The judgment should be affirmed, with costs.

JENKS, P. J., THOMAS and RICH, JJ., concurred.

Judgment affirmed, with costs.

In the Matter of Proving the Last Will and Testament of
LIZZIE H. HOLME, Deceased.
EDWIN C. HALL, Petitioner, and Others, Appellants; LEICESTER
HOLME, Contestant, Respondent.

(*Supreme Court, Appellate Division, First Department, April 9, 1915.*)

SURROGATE'S COURT—CONTESTED PROBATE PROCEEDINGS IN NEW YORK COUNTY—WAIVER OF RIGHT TO JURY TRIAL—VALIDITY OF ORDER GRANTED BY ONE SURROGATE IN VIOLATION OF STIPULATION MADE BEFORE THE OTHER SURROGATE—MOTIONS AFFECTING CONTESTED PROBATE PROCEEDINGS, WHERE MADE.

Where, upon a proceeding before a surrogate of the county of New York, at Trial Term, for the probate of a will, the contestant asked for an adjournment which was granted, upon the ground that his counsel was ill, and the parties stipulated to waive all issues raised by the objections, except the due execution of the will, an order, granted by another surrogate of the county before the adjourned date, upon the application of new counsel retained by the contestant, permitting the filing in lieu of the original answer another one identical in terms, except that it demanded a jury trial, is a breach of the stipulation and in violation of

the provision of the Code of Civil Procedure, providing that a demand for a jury trial must be made with the objections.

Motions directly affecting contested probate proceedings on the calendar for trial should be made in the Trial Term.

APPEAL by Edwin C. Hall, petitioner, named as executor in the last will and testament of Lizzie H. Holme, deceased, and by others, beneficiaries under said will, from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 27th day of January, 1915, granting a motion by the contestant for leave to amend his answer and to have a jury trial.

Payson Merrill of counsel (Charles Thaddeus Terry with him on the brief), Merrill & Rogers, attorneys, for the appellant Hall.

William R. Conklin of counsel (Harry D. Holden with him on the brief), Conklin & Reid, attorneys, for the residuary legatees, appellants.

J. Mayhew Wainwright, for the appellant American Society for Prevention of Cruelty to Animals.

Samuel J. Wagstaff, special guardian for the appellants Annie Molloy, Jr., and others.

Edmund L. Mooney of counsel (John Delahunty, attorney), for the appellant, respondent.

CLARKE, J.— On June 20, 1914, Mrs. Lizzie H. Holme died leaving a will executed by her on July 22, 1907. After a variety of gifts to relatives, friends and charitable organizations, testatrix provided: "I have made the above disposition of my property conscious of the fact that I have a living hus-

band and also other relatives for whom I have made no provision in this my Last Will and Testament, and it is my express determination that they shall not have any share or benefit under this, my Last Will and Testament, nor in any manner share in my estate."

The executors named in the will offered the paper for probate by petition dated September 22, 1914, and thereafter the answer of Leicester Holme, the surviving husband of the testatrix, verified on the 28th of October, 1914, was filed. This answer set up that the paper offered for probate was not the last will and testament of said decedent, that it was not duly executed by her and that she did not publish the same as her will in the presence of the witnesses whose names were subscribed thereto. That she did not request said witnesses to be witnesses and that they did not sign in her presence or in the presence of each other. That on said 22d day of July, 1907, the said decedent, Lizzie H. Holme, was not of sound mind or memory or mentally capable of making a will. That the said paper writing was not freely or voluntarily made or executed by the said Lizzie H. Holme as her last will and testament, but that the said paper writing purporting to be her will was obtained and the subscription and publication thereof, if it was in fact subscribed or published by her, was procured by fraud and undue influence practiced upon the decedent by certain persons acting in concert whose names are at present unknown to this contestant.

That the paper propounded for probate herein is invalid as a last will and testament and is illegal and void in all respects.

Wherefore, the above-named contestant prays that this proceeding may be dismissed, with costs.

No one else filed objections.

On the thirty-first of October an order was entered setting the case down for trial on the first Monday of January, 1915. On the call of the calendar at the Trial Term by Mr. Surrogate

FOWLER on the first Monday, namely, the 4th day of January, 1915, the attorney for the contestant applied for an adjournment on the ground of the illness of counsel. Thereupon the trial was adjourned to the second Monday, the eleventh of January. Upon the case being called that day the attorney for the contestant said that as counsel's illness still continued, he would ask for an adjournment until the following Monday, and would state that he had decided to waive all issues raised by the objections except one, and that in case his counsel did not so improve by the following Thursday as to afford assurance that he would be able to try the case on Monday, the eighteenth, he would at once retain other counsel and proceed with the trial on that day. Thereupon counsel for the proponents said that to avoid all possible misapprehension he would say that that one issue was the due execution of the will and that he consented to the adjournment on that stipulation and on the further understanding that the case should proceed to trial on the following Monday, and thereupon the surrogate remarked: "We have only one issue to try, the due execution of the will," and adjourned the trial to the eighteenth.

On Wednesday, January thirteenth, new counsel was retained by the contestant, and on Thursday, January fourteenth, this counsel obtained an order to show cause from Surrogate COHALAN why an order should not be made permitting the contestant to withdraw the answer heretofore filed by him and to file an answer *de novo* in the form annexed and directing the trial by jury of the issues raised by such answer. The proposed new answer was identical with that already served except there was added thereto the following: "Leicester Holme, the contestant herein, demands a jury trial of the issues raised by this answer." Upon the return of this order to show cause the proponents of the will appeared and asked that it be sent to Trial Term where the case then was and where a stipulation had been entered into for hearing. This was denied and at the conclu-

sion of the argument the surrogate announced that he would grant the motion and set the case down for trial by jury on February 1, 1915. No order was presented for signature until Monday, the eighteenth, and then the surrogate directed that notice of settlement be given. On the same morning when the trial calendar was called by Surrogate FOWLER the attorney for the contestant asked that the matter stand over until two o'clock when his new counsel could be present, which was done. At two o'clock proponents' counsel claimed that the order asked of Surrogate COHALAN could only be made at the Trial Term and that even if signed it was void. Counsel for the contestant claimed that proponents' counsel was guilty of contempt in pressing the case for trial after the decision which had been made. Surrogate FOWLER directed the trial to proceed and thereupon contestant with counsel and attorney withdrew from the court room. Subscribing witnesses were thereupon examined and the will admitted to probate. The order here appealed from was the order of Surrogate COHALAN made on January 26, 1915, and filed *nunc pro tunc* as of January fifteenth permitting the contestant to file in lieu of the answer theretofore filed another one identical in terms except that it demanded a jury trial and ordered that the trial be had on the 1st day of February, 1915, of the controverted fact and that the order dated January 22, 1915, be respectfully referred to Mr. Surrogate FOWLER.

Section 2537 of the Code of Civil Procedure (added by Laws of 1914, chap. 443) provides: "Whenever in any proceeding in the Surrogate's Court, the order or decree of the court will determine any issue or fact as to which any party has a right of trial by jury in any court, such trial shall be deemed to be waived, unless such party, personally, or through his attorney, guardian, committee, or special guardian appears and seasonably demands the same, in which case such trial shall be had according to the practice of such court. * * *."

Section 2538 (as amd. by Laws of 1914, chap. 443)* provides: "In any proceeding in which any controverted question of fact arises, of which any party has constitutional right of trial by jury, and in any proceeding for the probate of a will in which any controverted question of fact arises, the surrogate must make an order directing the trial by jury of such controverted question of fact, if any party appearing in such proceeding seasonably demands the same."

Section 2617 (added by Laws of 1914, chap. 443) provides: "Any person interested in the event as devisee, legatee or otherwise, in a will or codicil offered for probate; or interested as heir-at-law, next of kin, or otherwise, in any property, any portion of which is disposed of or affected * * * by a will or codicil offered for probate; * * * may file objections to any will or codicil so offered for probate.

"Such objections must be filed at or before the close of the testimony taken before the surrogate on behalf of the proponent, or at such subsequent time as the surrogate may direct, and if a jury trial of any issue is desired the same shall be demanded in the objections."

It is clear that the demand for a jury trial had not been seasonably made because it had not been demanded in the objections, and, therefore, it had been waived under the express provisions of the statutes quoted. To permit the withdrawal of objections from the files in order that the precise objections as made might be refiled with the addition of a demand for a jury trial, the time allowed for such demand having long since expired, was an obvious attempt to avoid the statute which is not to be approved.

We are also of the opinion that under the division of the work of the Surrogates' Courts as provided in section 2504 of the Code of Civil Procedure (now section 2506, as amd. by

* Since amd. by Laws of 1915, chap. 275.— [Rev.]

Laws of 1914, chap. 443), motions directly affecting contested probate proceedings on the calendar for trial should have been exclusively in the Trial Term. (See matter of Martin, 80 Misc. Rep. 17.)

But the main reason why the order appealed from was erroneous is that it was made on a breach of a stipulation made and entered into in open court. Up to the time that new counsel appeared in the case no one upon either side, proponent, contestant or their respective attorneys and counsel, had contemplated for a moment a trial by jury. The postponement obtained on the eleventh of January was upon the stipulation that there was but one issue to be tried, that the case would proceed upon the next Monday upon that one issue at the Trial Term before the surrogate who was then hearing the call of the calendar, before whom the contested proceeding was pending and necessarily without the interposition of a jury.

The attempted violation of the well-understood stipulation made in open court by which the trial was postponed to another month before a different surrogate and before a jury receives our emphatic disapproval. The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

INGRAHAM, P. J., SCOTT, DOWLING and HOTCHKISS, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

In the Matter of Proving the Last Will and Testament of
LIZZIE H. HOLME, Deceased.

LEICESTER HOLME, Contestant, Appellant; EDWIN C. HALL, as
Executor, etc., of LIZZIE H. HOLME, Deceased, and Others,
Respondents.

(Supreme Court, Appellate Division, First Department, April 9, 1915.)

**SURROGATE'S COURT—CONTESTED PROBATE PROCEEDINGS—WHEN CON-
TESTANT NOT ENTITLED TO SET ASIDE PROCEEDINGS AS UPON A DEFAULT.**

Where, after the adjournment of a contested probate proceeding before a surrogate of New York county at Trial Term, an order was granted by the other surrogate at Chambers, in violation of an oral stipulation made before the first surrogate, and in contravention of the provisions of the Code of Civil Procedure, allowing the contestant to file a new answer demanding a jury trial to be held after the adjourned date, the parties appear before the surrogate at Trial Term on the adjourned date and the contestant refuses to proceed, and deliberately abandons the case, and the will is duly admitted to probate, the contestant is not entitled to set aside the proceedings as upon a default.

APPEAL by Leicester Holme, contestant, from an order of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 4th day of March, 1915, denying his motion to vacate and set aside a decree admitting to probate the will in this proceeding, and granting letters testamentary thereon, and also from an order entered on the 9th day of March, 1915, denying his motion for a reargument.

Edmund L. Mooney of counsel (John Delahunty, attorney),
for the appellant.

Payson Merrill of counsel (Charles Thaddeus Terry with
him on the brief), Merrill & Rogers, attorneys, for the respond-
ent Hall.

William R. Conklin of counsel (Harry D. Holden with him on the brief), Conklin & Reid, attorneys, for the residuary legatees, respondents.

J. Mayhew Wainwright, for the respondent American Society for Prevention of Cruelty to Animals.

Samuel J. Wagstaff, special guardian, for the respondents Annie Molloy, Jr., and others.

CLARKE, J.—After the proceedings outlined in the opinion in this same matter (167 App. Div. 237), handed down herewith, the case was regularly called before Mr. Surrogate FOWLER, holding the Trial Term, upon Monday, January eighteenth, to which date the trial had been adjourned pursuant to the stipulation made in open court referred to. On the morning call of the calendar counsel asked for an adjournment until the afternoon until the new counsel could be present, which was granted. At two o'clock the contestant, his attorney and counsel were present and the case was again called. Whereupon the proceedings had, which have been outlined in the opinion referred to, were called to the attention of the surrogate presiding. The contestant took the position that this case was to be tried before a jury under the order granted. The surrogate stated that he had seen no such order and that he had made no such order; "That the learned surrogate sitting at Chambers must have been under a misapprehension. I can hardly assume that the order has been made, but if it has been made, I will vacate that order. Are you ready for trial?" Counsel for contestant stated that "under the circumstances we are forced to withdraw" and thereupon contestant and his attorney and counsel left the court room. The witnesses were thereupon called and fully examined and the will was admitted to probate and letters testamentary issued thereunder. Subsequently

the contestant moved to set aside the probate and the proceedings as upon a default. But there was no default. There was a deliberate abandonment of the case after it had been set down for trial upon stipulation made in open court and it is not to be treated as an inadvertent default. For that abandonment the appellant has exhibited no satisfactory excuse.

The orders appealed from should each be affirmed, with ten dollars costs and disbursements to the respondent.

INGRAHAM, P. J., SCOTT, DOWLING and HOTCHKISS, JJ., concurred.

Orders affirmed, with ten dollars costs and disbursements.

GUSTAV GERBER, Appellant, v. THE STATE BANK, Respondent.

(*Supreme Court, Appellate Division, First Department, April 9, 1915.*)

HUSBAND AND WIFE—DECEDENT'S ESTATE—TITLE OF HUSBAND TO PERSONAL PROPERTY OF DECEASED WIFE—RIGHT OF HUSBAND TO MONEYS ON DEPOSIT IN NAME OF WIFE—ADMINISTRATION NECESSARY.

Upon the death of a wife, intestate and without descendants, the title of her personal property of all kinds at once passes to and vests in her surviving husband, notwithstanding the statutory provisions which have secured to the wife during coverture the same rights to her separate property and the disposition thereof that she would have enjoyed if unmarried. This title is derived solely from the *jus mariti*.

Where a wife dies intestate without descendants, and without leaving any debts, the husband, although of sufficient financial responsibility to pay her debts, if she should have any, cannot recover in his individual capacity, without administration, moneys on deposit in the name of the wife at the time of her death.

APPEAL by the plaintiff, Gustav Gerber, from an order and determination of the Appellate Term of the Supreme Court in favor of the defendant, entered in the office of the clerk of the

county of New York on the 14th day of December, 1914, affirming an order of the City Court of the City of New York denying the plaintiff's motion for judgment on the pleadings.

Jacob I. Wiener, for the appellant.

Joseph E. Cosgrove, for the respondent.

SCOTT, J.—The complaint, summarized, alleges that plaintiff was the husband of Eva Gerber, who died February 4, 1914, intestate and without descendants; that said intestate left no debts and that plaintiff is of sufficient financial responsibility to pay her debts, if she left any. It is further alleged that at the time of her death said Eva Gerber had on deposit in defendant, and said defendant owed her, a sum of money, which plaintiff seeks to recover in his own right by virtue his *jus mariti*, no administrator having been appointed. The defendant demurs.

It is the settled law in this State that upon the death of a wife, intestate and without descendants, the title of her personal property of all kinds at once passes to and vests in her surviving husband, and this notwithstanding our Married Women's Acts, which have secured to a wife during coverture the same rights to her separate property and the disposition thereof that she would have enjoyed if unmarried (*Gittings v. Russel*, 114 App. Div. 405; *Robins v. McClure*, 100 N. Y. 328; *Ransom v. Nichols*, 22 id. 110), and that this title is derived solely from the *jus mariti* is now also well settled. In *Barnes v. Underwood* (47 N. Y. 351) it was intimated that in such a case the husband's title was derived through his right to administer, but this view was distinctly repudiated in later cases. (*Robins v. McClure*, *supra*.)

The only question in the case is whether or not, as to a chose in action like the debt owed by defendant to plaintiff's deceased wife, the husband must, in order to recover, take out adminis-

tration, or may, as he seeks to do here, recover in his individual capacity without administration. This precise question does not appear to have been passed upon in this State, although the authorities are numerous in other States to the effect that having failed to reduce the property into possession during coverture, it becomes a part of the wife's estate, to be recovered through administration. (See cases collated in 21 Cyc. 1179.) The rule was formulated in *Allen v. Wilkins* (85 Mass. 321.) That was an action upon a promissory note given to the wife and held by her at her death. It was held that it was a chose in action, and, since the husband had omitted to reduce it to possession during coverture, the property passed at the wife's death to her legal representatives, the court saying: "The rule is well settled that choses in action belonging to a married woman can be recovered after her death by her administrator and that the husband cannot maintain an action upon them unless he sues in that capacity." This appears also to have been the rule at common law. Blackstone thus expresses it: "But in case the husband survives the wife, the law is very different with respect to chattels real and choses in action, for he shall have the chattel real by survivorship, but not the chose in action * * *. But the chose in action shall not survive to him because he never was in possession of it at all during coverture, and the only method he had to gain possession was by suing in his wife's right, but as, after death, he cannot bring an action in her right because they are no longer one and the same person in law, therefore, he can never recover the possession. But he still will be entitled to be her administrator, and he may in that capacity recover such things in action as became due to her during the coverture." (Book II, pp. 434, 435; Sharswood ed. vol. 1, p. 434.) So, also, Chancellor KENT expresses the same rule: "As to debts due to the wife at the time of her marriage or afterwards, by bond, note or otherwise, and which are termed choses in action, they are not vested absolutely in the husband, but the husband has power to sue for and

recover or release or assign the same; and when recovered and reduced to possession *and not otherwise*, it is evidence of a conversion of the same to his own use, and the money becomes, in most cases, absolutely his own * * *. If his wife dies and he survives her before he has reduced the chose in action to possession, it does not strictly survive to him; but he is entitled to recover the same to his own use, by acting as her administrator." (2 Kent Comm. [14th ed.] 135. See, also, Schouler Dom. Rel. [5th ed.] § 198.)

That, in case of the death of a wife owning choses in action not reduced to possession by the husband during coverture, it may be necessary for the husband to take out letters of administration in order to collect is distinctly recognized in *Olmsted v. Keyes* (85 N. Y. 602), in which Judge EARL, writing for the court, said: "All the choses of the wife not reduced to possession during the joint lives, by the common law, passed to the husband upon her death * * *. He may then release them or take payment of them without administration, *if he can get payment*. * * * If administration is needed to reduce the choses to possession, he is entitled to it, and if there are no debts the administration is solely for his benefit."

We are of opinion that, in a case like the present where the debtor to the wife at the time of her death is unwilling to make voluntary payment to the husband, the latter can enforce payment only by taking out letters of administration in due and orderly course. This may serve to protect the debtor if, as may happen, it shall hereafter be found that the wife was in debt at the time of her death.

The determination appealed from should be affirmed, with costs.

INGRAHAM, P. J., CLARKE, DOWLING and HOTCHKISS, JJ., concurred.

Determination affirmed, with ten dollars costs and disbursements.

JOHANNA VON MEYER, Individually and as Committee of the Person and Estate of JOHN GEORGE LINDEMANN, an Incompetent Person, Respondent, *v.* KATHERINE F. LINDEMANN, Appellant, Impleaded with HELENA MARIA RICHTER and Others, Defendants.

(First Department, May 7, 1915.)

EQUITY—WILL—JURISDICTION OF COURT OF EQUITY TO CONSTRUER DEVISES—PLEADING—COMPLAINT.

A court of equity has no inherent power to construe devises as a distinct and independent branch of its jurisdiction, but exercises such power only as an incident to its jurisdiction over trusts.

Hence, where a testator gave all his personal property to his wife and also gave to her his residuary estate during her life or until she remarried, with a power of appointment, and provided that if she did not exercise the power then such property should pass to his children and their survivors, and the widow died unmarried without exercising the power of appointment, the children take only a *legal estate*, and, therefore, a court of equity has no jurisdiction of a suit to which they are parties for the construction of the will.

A complaint which, after setting out a copy of the will of the testator, alleges among other things that the widow died without having remarried, leaving a will which was duly admitted to probate, but contains no allegation from which it can be inferred that she exercised the power of appointment, does not state facts sufficient to constitute a cause of action for the construction of the will of the testator.

APPEAL by the defendant, Katherine F. Lindemann, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of January, 1915, denying her motion for judgment on the pleadings after she had interposed a demurrer to the complaint.

Leslie C. Ferguson, for the appellant.

Charles A. Dryer, for the respondent.

MCLAUGHLIN, J.— John G. Lindemann died on the 7th of August, 1884, leaving him surviving a widow and several children. The will was admitted to probate and letters testamentary issued to the executrix therein named. It gave all the personal property, after the payment of debts, to his wife, and also gave to her the rents, income and profits of all the residuary estate during her life or so long as she remained his widow, and upon her death or remarriage he gave such residue “to such person or persons as she shall direct and appoint by her last will and testament in case of her death or by instrument under her hand and seal, duly acknowledged, in case of her remarriage.” If she died, or in case of remarriage, without making such appointment, then he gave the “residuary estate to my children living at my wife’s death or remarriage, whichever event shall first happen and to the issue then living of any of my children who shall then be dead leaving issue, such issue to take collectively the share which their parents would have been entitled to if living.” This action is brought to procure a judgment construing such will. The complaint, after setting out a copy of the will, alleges, among other things, that Helena M. E. Lindemann, the widow, died on or about January 25, 1913, without having remarried, leaving a last will and testament which was duly admitted to probate by the surrogate of the county of New York. A copy of the will of Mrs. Lindemann is not annexed to or made a part of the complaint, nor are any of its provisions set forth, and whether she exercised the power of appointment given to her in the will of her husband is not stated in any way, unless the same is to be inferred from the following allegations: “That the provisions of the said last will and testament of said John G. Lindemann, deceased, relating to the residuary estate belonging to him at the time of his death, were not carried into effect by said Helena M. E. Lindemann * * * and the apportionment expressly directed by said last will and testament of said John G. Lindemann, deceased, to be made of the

residue of his estate was not made * * * in her said last will and testament." The judgment demanded is that the court ascertain and determine the true meaning and construction of the will of John G. Lindemann. The appellant demurred to the complaint upon the ground, (a) that it did not state facts sufficient to constitute a cause of action; (b) that the court did not have jurisdiction of the subject of the action. After the demurrer had been interposed the appellant moved under section 547 of the Code of Civil Procedure for judgment on the pleadings. The motion was denied and the appeal is from that order.

The complaint, in my opinion, does not state a cause of action. There is no allegation in it, or any from which it can fairly be inferred, that Mrs. Lindemann exercised the power of appointment given to her in her husband's will. If she did not exercise such power, then, upon her death, she never having remarried, all of the property passed to the persons specified in the will of her husband. Under the terms of his will, in default of her exercising the power of appointment, such property upon her death passed to and became vested in his children and their survivors. They are the parties to this action and now hold such property under such devise and have only a legal estate. In that case no trust is involved. It is well settled that there is no inherent power vested in a court of equity in the construction of devises as a distinct and independent branch of jurisdiction, but it exercises its equitable power only as incident to its jurisdiction over trusts. (*Mellen v. Mellen*, 139 N. Y. 210; *Anderson v. Anderson*, 112 id. 104.)

In *Weed v. Weed* (94 N. Y. 246) the court held that "A devisee who claims a mere legal estate in real property of the testator, where there is no trust, cannot maintain an action for the construction of the devise, but must assert his title by ejectment or other legal action; or if in possession, must await an

attack upon it and set up the devise in answer to the hostile claim."

Adams v. Becker (47 Hun, 65), upon which the respondent principally relies, is clearly distinguishable from this case. There the action was brought to construe a will for the reason that it contained disputed and doubtful devises. Here there is no doubt as to the intention of John G. Lindemann. The language used indicates clearly what disposition he desired made of his property. All of the personal property he gave to his wife. The residuary estate he gave to her for life, or until she remarried, with the power of appointment. If she did not exercise that power, then it passed to his children, or if any of them were dead, leaving issue, the issue to take what the parent would have taken if living.

The order appealed from, therefore, is reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs, with leave to the plaintiff to serve an amended complaint upon payment of costs in this court and in the court below.

INGRAHAM, P. J., DOWLING and HOTCHKISS, JJ., concurred;
LAUGHLIN, J., concurred on first ground.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to plaintiff to serve an amended complaint upon payment of costs in this court and in the court below.

In the Matter of the Petition of AARON BEARSE to Compel a Judicial Settlement of the Accounts of JENNIE E. BROWN, as Executrix, etc., of IZABENDA FULTON, Deceased; AARON BEARSE, Petitioner, Appellant; JENNIE E. BROWN, as Executrix, etc., Respondent.

(Supreme Court, Appellate Division, Fourth Department, April 28, 1915.)

WILL CONSTRUED—DEVISE WITH CONTINGENT REMAINDERS OVER IF BENEFICIARY DIES WITHOUT ISSUE—ACCOUNTING BY EXECUTRIX—WHEN CONTINGENT REMAINDERMEN MAY INSTITUTE PROCEEDING.

A will wherein the testatrix by a first clause gave and bequeathed to her daughter all her property of every kind and description and by a second clause gave and bequeathed to the nephews and nieces of the testatrix all the estate received by the daughter by virtue of the will and held by her at the time of her decease, if she should die without issue, does not give to the daughter a fee simple absolute in the real property, but reserves to the nephews and nieces, as remaindermen, certain contingent interests which make them persons "interested in the estate" of the testatrix within the meaning of the statute. Hence, a nephew of the testatrix is entitled to maintain a proceeding to compel the daughter as executrix to make an accounting.

APPEAL by the petitioner, Aaron Bearse, from a decree of the Surrogate's Court of the county of Onondaga, entered in the office of said Surrogate's Court on the 7th day of October, 1914, denying his application to compel the executrix to account herein.

A. Lee Olmsted (Olmsted, Van Bergen & Searl, attorneys), for the appellant.

William H. Harding (Goodelle & Harding, attorneys), for the respondent.

MERRELL, J.—The petitioner claims to be a person interested in the estate of Izabenda Fulton, late of the county of

Onondaga, deceased, and as such has instituted a proceeding to obtain a judicial accounting by the executrix of the will of said decedent. The executrix contends, and the surrogate of Onondaga county, in the order appealed from, has decided, that the petitioner is not a person interested in said estate entitled to require such accounting, and the petition therefor has been dismissed. The controversy involves the construction of the will of said decedent.

Izabenda Fulton died in the county of Onondaga, where she then resided, in the year 1875, leaving a daughter, Jennie E. Brown, as her sole heir at law and next of kin, her surviving, and leaving a last will and testament, executed by said decedent on the 27th day of December, 1871. Subsequent to the death of decedent and on the 12th day of July, 1875, said will was duly admitted to probate in the Surrogate's Court of said county of Onondaga, and letters testamentary thereon on said last-mentioned date duly issued out of and under the seal of the said Surrogate's Court to the said Jennie E. Brown, sole executrix in said will named. The said executrix duly qualified as such and entered upon and ever since has acted and is still acting as executrix of said will, and said letters testamentary still remain in full force and effect.

After the usual preliminary and formal recitals, the instrument provides:

"*First.* I give and bequeath to my daughter, Jennie E. Brown, all of my estate, both real and personal, of every kind and description, whatsoever.

"*Second.* In case the said Jennie E. Brown shall die without issue then and in that case I give and bequeath all of the estate received by her by virtue of this instrument and held by her at the time of her *disease* to the children of my brothers, Ward Bearse and Aaron Bearse, and to James M. Bearse, who is the son of my deceased brother, David Bearse, share and share alike."

By the third and last clause of the will the said Jennie E. Brown is named as sole executrix.

It is the contention of the petitioner that the first clause of said will, which would seem in and of itself to give and bequeath unto the daughter Jennie all of the property of the testatrix, was limited by the second clause, and that, reading the two clauses together, the daughter was not given an estate in fee simple absolute in the real property of which decedent died possessed. It is the claim of the petitioner that such part of decedent's property as might remain and be held by said daughter at the latter's decease, in case she should leave no issue her surviving, should pass to the persons named in the second clause of said will.

On the other hand, the daughter claims that the testatrix, having, by the first clause of the will, bestowed upon her all of her estate, both real and personal, and of every kind and description whatsoever, without limitation therein expressed, the second paragraph of the will was repugnant thereto, and that her estate cannot thereby be taken away.

The petitioner is a son of Ward Bearse, a brother of testatrix, and one of the persons specified in the second clause of the will. Therefore, if petitioner is correct in the interpretation he seeks to put upon said will, he is an interested party and entitled to obtain an accounting by said executrix, pursuant to the provisions of the Code of Civil Procedure. (See Code Civ. Proc., § 2727 *et seq.*, as amd. by Laws of 1914, chap. 443.) No accounting has ever been had by said executrix since letters were issued to her. She is now over sixty years of age and is without issue.

What then was the intention of the testatrix as to the disposition of her property and estate by the two clauses of her will above quoted? By the first clause it will be noted the testatrix gives and bequeaths to her said daughter all of her estate, both real and personal, of every kind and description what-

soever. The usual words of inheritance, where an intention exists to convey an absolute estate, are wanting. Still in and of itself it must be conceded that the first clause, taken alone, would be sufficient to bestow upon the daughter all of the estate and property of the testatrix. By the second clause it is provided that in case the daughter shall die without issue, then all of the estate received by her under the will, and held by her at the time of her decease, is given and bequeathed to the children of Ward Bearse and Aaron Bearse, brothers of testatrix, and to James M. Bearse, a son of a deceased brother, share and share alike. It seems entirely clear to me that it was the intention of the testatrix by the 2d clause of the will to limit the estate which she gave to her daughter in the 1st clause. That is, she intended, not that her daughter should take an unconditional estate in the property, but that as to such part thereof as might remain after the daughter's death without leaving issue and be then held by her, should pass to the nephews or nieces specified in the 2d paragraph. A great many cases are cited by counsel in their respective briefs as authority for the positions taken for and against the petitioner herein. Canons of interpretation are invoked to discover, if possible, the intention of the testatrix in the use of the language of her will. Indeed, the courts have laid down certain canons of construction to be applied in cases where the language used in a will is ambiguous and the intention of the testator hidden or uncertain. The real test in the construction of a will is to determine, if possible, what, in fact, was the intention of the testator. It has been often remarked that no will has a brother, and it is undoubtedly true that reliance must chiefly be had upon the provisions of the instrument under consideration in order to discover the intention of the testator, rather than through the application of rules of construction.

The respondent cites the old common-law case of *Jackson v. Bull* (10 Johns. 19) and a number of other kindred cases hold-

ing that in cases where a will in one clause grants an estate in clear and decisive terms, such estate cannot be taken away or cut down by any subsequent words that are not as clear or decisive as the words creating the estate, and that any subsequent paragraph of the will tending in any manner to cut down such provisions is repugnant to the first provision and void. This undoubtedly was the law prior to the Revised Statutes, and to some extent and in some cases is still applicable. Since the enactment of the Revised Statutes the trend of authority seems to be against any construction destroying a clause in a will which limits or cuts down a prior absolute gift. The most that can be said of the authorities cited by the respondent is that an absolute estate given in one part of a will in clear and decisive terms cannot be cut down or limited by a subsequent part of the will, unless the subsequent part is expressed in equally as clear and decisive language as the part giving the absolute estate. The difficulty with the application of such authorities cited by the respondent to the will in question is that the terms of the 2d clause seem to be no less clear than those of the 1st. While the 1st clause gives to the daughter all of the property of testatrix, the 2d clause immediately thereafter limits such gift by a provision that if the daughter "shall die without issue then and in that case I give and bequeath all of the estate received by her by virtue of this instrument and held by her at the time of her (decease) to the children of my brothers, Ward Bearse and Aaron Bearse, and to James M. Bearse, who is the son of my deceased brother, David Bearse, share and share alike." Can there be any question that by these two provisions read together it was the intention of the testatrix to turn over to her daughter, Jennie, all of her estate, and that the same should vest in such daughter, subject to being divested as to such part thereof as the daughter might hold at the time of her decease without issue? What possible object could the testatrix have had, if it was her

intention to give to the daughter an absolute estate in all of her property, to have included the 2d clause of her will? Indeed, if it was the intention of the testatrix that her daughter should take all of her estate, said daughter being her sole heir at law and next of kin, was it necessary for the testatrix to make a will at all? The statutes of the State would fully carry out such intention unassisted by any testamentary act. The provisions of the 2d clause certainly had some force or they would not have been included in the will. The law is elementary that it is the duty of courts in construing wills to include all parts of the will and to construe the same in relation to each other, and so far as possible to form one consistent whole. It was the evident intention of the testatrix to provide amply for her daughter, but if, upon the daughter's death without issue she should still hold some part of the estate given her by said will, that such part of the estate should go to the relatives and next of kin of the testatrix rather than to members of her husband's family. In other words, that the property which she had accumulated should go to her own blood relatives. If, in interpreting this will, we eliminate the word "second," following the 1st clause, and read the 2d clause as a part of the 1st, the intention of the testatrix is manifest. I cannot but believe that the testatrix intended that such disposition should be made of her property as the reading of the two clauses together would provide. It is a well-known principle of construction that every expression in a will should, if possible, be given some effect, and that a clause of a will is never rejected, except as it may be necessary to uphold another clause entirely irreconcilable thereto.

The case of *Leggett v. Firth* (53 Hun, 152; *affd.*, 132 N. Y. 7) construes a will similar to that under consideration here. By the provisions of that will the testator gave, devised and bequeathed to his wife "all the rest and residue of my real estate, but on her decease, the remainder, if any, I give and devise to my children * * * in equal shares." The court held that

the wife took a fee in the premises in question in that action, subject to the condition that the power of disposition should be exercised during her lifetime, and that under said will a valid and expectant estate passed to the children of the testator, liable only to be defeated by the exercise of the power of disposition given the wife during her lifetime.

In *Terry v. Wiggins* (47 N. Y. 512) testator, by his will, gave his wife certain real estate for her sole and absolute use and disposition, and also all his other property and effects for her own personal and independent use and maintenance with full power to sell and dispose of the same if she should require it or deem it expedient so to do. After the wife's death, the executors were authorized to invest whatever residue there might remain of testator's property for the benefit of a certain religious society. Testator died in 1862, and his wife six years later. She never disposed of any of the real estate, and her heirs brought action in ejectment to recover possession of the lands. The court held that the widow had a life estate only in the property, with a conditional power of disposal during her lifetime, and that the limitation over was not repugnant to the devise and was valid.

The case of *Kurtz v. Wiechmann* (75 App. Div. 26) considers the effect of a subsequent clause in a will destroying the plain provisions of a previous clause. In that case the testator devised his estate to his wife in fee simple absolute and with full power to sell and convey. The will also provided that "after the death of my said wife, the remainder of my estate is to be divided in halves, one-half is to be divided between the legal heirs on my side, and the other half between the legal heirs of my wife's." The court held that the testator's wife did not take an estate in fee simple absolute, but only a life interest therein, with the powers specified in the will. Mr. Justice WILLIAMS, writing in the case, said: "The person who drew the will apparently did not appreciate fully the meaning of the

terms used in the first part of the 3d clause, but, taking the two clauses together, we have no difficulty in understanding what was intended to be accomplished by the will. There is no legal rule which interferes with our giving effect to this evident intention of the testator. The only rule suggested is the one relating to the cutting down of an absolute estate given by the language of one part of a will by the language of a subsequent part thereof. This rule, correctly stated, however, is as follows: 'When an absolute estate is given in one part of a will in clear and decisive terms, such estate cannot be cut down or limited to a life use by a subsequent part of the will, unless the part providing for a life estate is expressed in as clear and decisive language as the part giving the absolute estate.' * * *

"In this case the 4th clause expresses the intention to limit the estate of the widow to a life use and to give the remainder to other persons just as clearly as language can be made to do it. The rule referred to, therefore, in no way interferes with the construction given by us to the will."

It seems to me that the same observations can well be made of the two provisions of the will of Izabenda Fulton now under consideration. While she does state in the 1st clause that she gives and bequeaths to her daughter Jennie all of her estate, both real and personal, of every kind and description whatsoever, by the 2d clause, in no less positive, clear and unambiguous terms, she provides that as to such part of her said property which the daughter shall receive under that will and which she may hold at her decease without issue shall pass to and become the property of the persons mentioned in said 2d clause.

To the same effect are the following cases: *Matter of McClure* (136 N. Y. 238); *Mee v. Gordon* (187 id. 400); *Matter of Griffin* (75 Misc. Rep. 441); *Avery v. Everett* (110 N. Y. 317); *Van Derzee v. Slingerland* (103 id. 47).

It perhaps is unfortunate that the question as to the interpretation of this will arises in the manner that it does in this pro-

ceeding, as nobody would probably be bound by the determination, save the executrix and the petitioner. It is not necessary for us to hold, it seems to me, just what estate the daughter took in the property of the testatrix, whether it was merely a life estate with a remainder over to the children of the brothers of testatrix, or whether it is within the power of the daughter to dispose of all of the estate which she received under the will prior to her decease, and thus cut off the petitioner and others of his class. All that is necessary for us to determine, it seems to me, is as to whether or not, under the terms of the will, the petitioner has some contingent interest in the property of the testatrix. I am convinced that he has such an interest. Whether such interest may be cut off by act of the daughter is not here important. The fact remains, in my judgment, that under the terms of the will the petitioner has a contingent interest in the property of testatrix. If so, he is entitled to an accounting.

I am of the opinion that the estate of the testatrix under her will vested in Jennie E. Brown, subject to being divested as to such portion thereof as might remain at the death of said daughter without leaving issue, said remainder, if any, under the terms of said will, passing to the children of the brothers of testatrix named in the 2d clause of her will; and that the petitioner is a person interested in the estate of said decedent, and entitled to the accounting demanded. The decree of the surrogate should be reversed and the matter remitted to Surrogate's Court to proceed upon the petition filed.

All concurred.

Decree reversed, without costs, and matter remitted to the surrogate to proceed upon the petition filed with him.

WILLIAM D. STEWART, Appellant, v. LEOPOLDO FRANCHETTI,
Respondent.

(Supreme Court, Appellate Division, First Department, May 7, 1915.)

WILL—TRUST FOR CHARITABLE PURPOSES—BENEFICIARIES MAY BE INDEFINITE—DECREE DECLARING INVALIDITY OF TRUST ENTERED AFTER DEATH OF TRUSTEE—WHEN EXECUTION OF TRUST DEVOLVES UPON SUPREME COURT—WHEN TRUST ESTATE DOES NOT REVERT TO CREATOR ON MISAPPLICATION OF FUNDS BY TRUSTEE.

Where a testator in bequeathing a share of his residuary estate declared that it was understood between him and the legatee that she was to expend the amount "in charity, both in the Kingdom of Italy and in the City of New York," there was a valid charitable trust created.

Under the present provisions of the Personal Property Law, charitable trusts are no longer invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries, and in the trust aforesaid the decision as to who shall be the recipient of the charity is left to the discretion of the trustee.

Where the trustee having legal title dies, the execution of the trust devolves upon the Supreme Court.

A decree of the Surrogate's Court declaring that a trust for charitable purposes is invalid is absolutely void as to the trustee and as to all persons claiming under her, and may be attacked collaterally, if the decree was not entered until after the death of the trustee.

It follows that where a decree declaring the invalidity of the charitable trust aforesaid is void, being entered after the death of the trustee so that the execution of the trust has devolved upon the Supreme Court, the assignee of one of the residuary legatees under the will creating the trust has no standing to maintain an action to recover the trust property, which he alleges has not been devoted to charitable purposes. This, because in the absence of an express provision to that effect, there is no reversion to the estate of the creator of the trust even though the trustee be guilty of a breach of trust.

APPEAL by the plaintiff, William D. Stewart, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 14th day of December, 1914, dismissing the third amended complaint upon the decision of the court sustaining a demurrer

thereto, and also from the order made at the New York Special Term and entered in said clerk's office on the 10th day of December, 1914, which sustained the demurrer to the third amended complaint, and pursuant to which the judgment was entered.

Allen S. Wrenn, for the appellant.

Lewis L. Delafield (Julius Goldman with him on the brief),
for the respondent.

MCLAUGHLIN, J.—The defendant demurred to the third amended complaint and then moved, under section 547 of the Code of Civil Procedure, for judgment on the pleadings. The demurrer was sustained and the motion granted. Plaintiff appeals.

The action is for money had and received. The facts alleged in the complaint are substantially as follows: That on or about October 5, 1909, the will of Julia Hallgarten and a codicil thereto were admitted to probate by the Surrogate's Court of the county of New York and letters testamentary issued to the executors therein named; that by the terms of the will the residuary estate was bequeathed, in equal shares, to her two daughters, Alice, who subsequently married the defendant Franchetti, and Eleanor, who married one von Koppenfels; that the codicil contained the following provision: "I give, devise and bequeath the amount which had been bequeathed to me by the last will and testament of my son Walter N. Hallgarten, to my daughter Alice Hallgarten Franchetti, it being understood between us that she has to spend said amount in charity, both in the Kingdom of Italy and in the City of New York, N. Y., U. S. A.;" that on or about December 15, 1911, in a proceeding in the Surrogate's Court of the county of New York, a decree was entered adjudging, among other things, that the bequest contained in the codicil was void, and that the money

ineffectually attempted to be bequeathed thereby passed to the residuary legatees under the will; that Alice Hallgarten Franchetti was originally a party to the proceeding and filed an instrument waiving the issuance of a citation, and consenting to the judicial settlement of the executors' account; that she died on October 22, 1911, nearly two months prior to the entry of the decree; that in December, 1910, the attorneys for the executors wrote Eleanor Hallgarten that a question had arisen as to the validity of the trust declared in the codicil of Julia Hallgarten's will and asked her wishes in the event that it should be declared by the surrogate to be invalid, in reply to which she wrote: "I wish my mother's intention carried out even if the Surrogate should decide that the trust is invalid;" that the bequest contained in the codicil amounted to \$98,337.11, of which, under the surrogate's decree, Eleanor Hallgarten and Alice Franchetti, as residuary legatees, were each entitled to one-half thereof, or \$49,168.55; and that on March 28, 1911, the executors, relying upon the above statement in the letter of Eleanor Hallgarten, paid to Alice Franchetti the entire sum of \$98,337.11. The complaint then alleges "That the said sum of \$49,168.55, to which the said Eleanor Hallgarten von Koppenfels was entitled, as aforesaid, was paid to and received by said Alice Franchetti without consideration, and upon condition that the same should be by her expended in charity, both in the Kingdom of Italy and in the City of New York, N. Y., U. S. A.;" that Alice Franchetti, after the receipt of said sum, invested the same in interest-bearing bonds and caused the same to be removed from the State of New York and from the United States; that she has failed and neglected to perform the condition upon which said sum was paid to her in that she has failed and neglected to expend any part of said moneys so received and invested by her in charity, either in the kingdom of Italy or in the city of New York; that she died on the 22d of October, 1911, and at the time of her death still had in her possession all

of said moneys which had been so invested; that the executors of the will of Julia Hallgarten claim that their responsibility for said moneys ceased and ended upon said payment, and by a decree of the Surrogate's Court of the county of New York after the payment was made, in a proceeding for the judicial settlement of their accounts, they were relieved and discharged from all further liability for said moneys; that after the death of Alice Franchetti, the defendant Leopoldo Franchetti took possession of said securities and caused a substantial amount of the same to be sold and the proceeds reinvested; that after the death of Alice, Eleanor Hallgarten von Koppenfels demanded of defendant payment to her of the sum of \$49,168.55, no part of which has been paid; that prior to the commencement of the action all her right, title and interest in and to the same were assigned to the plaintiff; that by reason of the facts stated, defendant is indebted to the plaintiff in the sum of \$49,168.55, for which, together with the interest thereon, judgment is demanded.

The principal question presented for our determination is whether a valid trust was created in the codicil to Julia Hallgarten's will, and in this connection it is contended by the appellant that that question is not open for consideration, since the decree of the Surrogate's Court determined to the contrary, and it cannot be attacked collaterally. That decree, according to the allegations of the complaint, was not entered until December 15, 1911, about two months after the death of Alice Franchetti, and, therefore, as to all persons claiming through her, is void. (Code Civ. Proc. § 765; Id. § 3347, subd. 6; *Requa v. Holmes*, 16 N. Y. 193; *Carolan v. O'Donnell*, 141 App. Div. 463.)

Considering the question then as an original one, I am of the opinion that a valid charitable trust was created. The development of the law relating to charitable trusts in this State since the passage of the Tilden Act, so called (Laws of 1893, chap.

701, as amd. by Laws of 1901, chap. 291; now Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 12, as amd. by Laws of 1909, chap. 144, and Laws of 1911, chap. 220; Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 113, as amd. by Laws of 1909, chap. 144), has been so frequently considered by the courts that a further review seems almost unnecessary. Under this act charitable trusts are no longer invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries. Thus, in *Matter of Robinson* (203 N. Y. 380) the court sustained a trust which directed the trustees to disburse the principal or interest of the residuary estate of a testatrix, or both, in their discretion, "To provide shelter, necessities of life, education, general or specific, and such other financial aid as may seem to them fitting and proper to such persons as they shall select as being in need of the same. Preference is to be given to persons who are elderly or disabled from work, and to persons who are Christians, of good moral character, members of one of the so-called evangelical churches, to wit, the Methodist, Baptist, Presbyterian, Congregational, Moravian or Episcopal, and who are not addicted to the use of intoxicants or tobacco, nor to attendance at theatrical entertainments."

In *Matter of Cunningham* (206 N. Y. 601) the testator bequeathed \$5,000 to his executors "to be by them applied in their best judgment and discretion to such charitable and benevolent associations and institutions of learning for the general uses and purposes of such associations and institutions as my said executors may select, and in such sums respectively as they may deem proper." In sustaining the trust, BARTLETT, J., who delivered the opinion of the court, said: "A considerable number of English cases might be cited in which the purpose of the charitable trust which received the sanction of the court was quite as indefinite. I shall refer to only a few of them. In *Moggridge v. Thackwell* (7 Vesey, 36b, 85) Ann

Cain gave her residuary personal estate to her executor, 'desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters;' and Lord ELDON affirmed the decree of Lord THURLOW who had held that the trust was sufficiently definite to be executed by the court. In *Legge v. Asgill* (Turner & Russell, 265, note) the testatrix made a number of bequests in her will, and executed a codicil providing: "If there is money left unemployed, I desire it may be given in charity." It was held that this was an effective gift of £2,000 of personal estate to charitable purposes. In *Whicker v. Hume* (7 House of Lords Cases, 124, 154) there was a bequest of personal property 'upon trust to apply and appropriate the same in such manner as the said trustees or trustee shall, in their absolute and uncontrolled discretion, think proper and expedient for the benefit, and advancement and propagation of education and learning in every part of the world.' It was objected that the gift was of such an extensive nature that it was impossible to carry it into effect; but Lord CHELMSFORD held that the purpose of the testator was to promote teaching and instruction, and the circumstance that the whole habitable world was open to the discretion of the trustees did not prevent the gift from being available as a good charitable bequest."

In *Matter of Miller* (149 App. Div. 113) this court held, where the income of a trust fund was directed to be expended for scholarships to be granted, "*first*, to the sons of poor clergymen in France intending to become ministers of the gospel, as may desire the same, and *secondly*, in the absence of such, to any poor young men wishing to become ministers of the gospel or missionaries," that the trust was valid and could be enforced. (See, also, *Buell v. Gardner*, 83 Misc. Rep. 513, where a trust created for the benefit of "institutions and persons who may be worthy, needy and deserving of the same," was held good. And *Utica Trust & Deposit Co. v. Thomson*, 87 Misc. Rep. 31,

where the income of a trust fund was directed to be paid yearly "to such charity or charitable institutions as shall be designated by and agreed upon by any three of said trustees.")

The language used in the codicil in creating the trust under consideration is no more indefinite than in some at least of the authorities cited. The amount given was to be spent in charity. That is clear. The purpose of the statute was to validate gifts or bequests where the beneficiaries were indefinite and uncertain. Here all that is uncertain is as to who shall be the recipient of the charity, and that necessarily must be left to the discretion of the trustees.

Matter of Shattuck (193 N. Y. 446), upon which the appellant principally relies, is not, as I read it, an authority for holding that the trust is void for indefiniteness of purpose; on the contrary, it seems to me an authority to the effect that the trust here created is valid. Judge CHASE, who delivered the opinion, said: "The act of 1893 doubtless saves a trust from being invalid because the beneficiaries are indefinite and uncertain, but a trust may be so indefinite and uncertain in its purposes as distinguished from its beneficiaries as to be impracticable, if not impossible, for the courts to administer." It was there held that the purpose for which the trust was designed was not, necessarily, charitable. This clearly appears from a statement in the opinion in Matter of Cunningham (*supra*). Judge BARTLETT said: "Inasmuch as it was possible, under the terms of the Shattuck trust, that it might be devoted in whole or in part to private use, the entire gift was pronounced invalid."

If the trust be valid the plaintiff, as the assignee, has no interest therein, and the same result follows if the trust created by the will were disregarded and the money sought to be recovered were given to Alice Franchetti by her sister upon condition that she expend the same in the charity alleged. It is well settled that when a valid charitable trust is created, without

provision for a reversion, the interest of the donor is permanently excluded. In the absence of such a provision the title to the property does not revert to the donor or his representatives. This rule was restated in *Associate Alumni v. Theological Seminary* (163 N. Y. 417), Judge CULLEN, who delivered the opinion of the court, saying: "The general rule is 'if the trustees of a charity abuse the trust, misemploy the charity fund, or commit a breach of the trust, the property does not revert to the heir or legal representative of the donor, unless there is an express condition of the gift that it shall revert to the donor or his heirs, in case the trust is abused; but the redress is by bill or information by the Attorney-General or other person having the right to sue.' (2 Perry on Trusts, § 744*; *Sanderson v. White*, 18 Pickering, 328; *Vidal v. Girard's Executors*, 2 Howard [U. S.], 191; *Mills v. Davison*, 54 N. J. Eq. 659.)" (See, also, 2 Story Eq. Juris. [13th ed.] § 1177; *Potter v. Chapin*, 6 Paige, 639.)

If it be true, therefore, as contended, that there has been a misuse of the trust fund, that would not entitle the donor, or in the case at bar the assignee of one of her residuary legatees, to the return of the fund. The legal title was in the trustee and, she having died, the execution of the trust devolves upon the Supreme Court (*Allen v. Stevens*, 161 N. Y. 122; *Matter of Griffin*, 167 id. 71) which carries the same into effect by a trustee appointed by it. The plaintiff has no standing to maintain such action, since he has no interest in the fund or the enforcement of the trust.

It follows, therefore, that the order and judgment appealed from should be affirmed, with costs.

INGRAHAM, P. J., LAUGHLIN, DOWLING and HOTCHKISS, JJ., concurred.

Judgment and order affirmed, with costs.

* See 2d ed.—[REF.]

WARREN PUTNAM NEWCOMB, as Executor, etc., of H. VICTOR NEWCOMB, Deceased, Appellant, v. JEANNE LA ROE, Respondent. (Action No. 2.)

(Supreme Court, Appellate Division, First Department, April 9, 1915.)

DECEDENT'S ESTATE—ACTION TO RECOVER MONEYS ALLEGED TO HAVE BEEN LOANED BY TESTATOR TO DEFENDANT—EVIDENCE—RES ADJUDICATA.

In an action to recover moneys alleged to have been advanced by plaintiff's testator for the purchase of a bond for the defendant, a former employee of the testator, by a stock brokerage firm, and other moneys advanced by him to her for her account with said firm, or paid to said firm by him for her account, and claimed to constitute loans from him to her, the defendant pleaded payment and proved the repayment of a portion of the money by her check, which was uncontroverted. The plaintiff claims that the judgment of this court on appeal in another action by him against the defendant for the construction of the testator's will, with respect to the effect on a claim for services made by the defendant of a legacy and an annuity to her, constitutes a conclusive adjudication that none of the moneys sought to be recovered in this action were advanced to the defendant on account of services, or were by agreement between her and the testator to be applied toward the payment of her claim, because the court reversed findings that the defendant had been paid the amount for which recovery is sought in this action. The defendant pleaded the pendency of the other action, and in her account annexed to her answer therein credited the plaintiff with the amount for which she is now sued. The attorney for the plaintiff in this action testified that the claim upon which it is based was not litigated in the other action.

Held, on all the evidence, that the decision of the court in the first action is not *res adjudicata*, and that a judgment in favor of the defendant should be affirmed.

APPEAL by the plaintiff, Warren Putnam Newcomb, as executor, etc., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 20th day of October, 1914, upon the verdict of a jury rendered by direction of the court.

D-Cady Herrick, for the appellant.

Nelson L. Robinson, for the respondent.

LAUGHLIN, J.— This action was brought on the theory that \$757.50 advanced by the plaintiff's testator for the purchase of a bond for the defendant by the stock brokerage firm of Degener & Burke, and other moneys aggregating \$507.56 advanced by him to her for her account with said firm or paid to said firm by him for her account, constituted loans from him to her aggregating \$1,265.06, and judgment was demanded for that amount. The defendant pleaded payment and proved the repayment of \$500 by her check, and that evidence is uncontroverted. At the close of the evidence both parties moved for a direction of a verdict, thus leaving the facts to the court, and a verdict was directed for the defendant.

The principal contention made by the appellant is that the judgment of this court on the appeal in another action known as action No. 1, which was by the same plaintiff against the same defendant and was for the construction of the will of plaintiff's testator with respect to the effect, on a claim for services made by the defendant, of a legacy and an annuity to her, and in the event that it should be decided that the acceptance of the legacy and annuity did not constitute payment of her claim for services to have the amount of her claim for services determined, constitutes a conclusive adjudication that none of the moneys sought to be recovered in this action were advanced to the defendant on account of services, or were by agreement between her and the testator, express or implied, to be applied on or toward the payment of her claim for such services. This contention is based upon the reversal by this court on the appeal in the other action (*Newcomb v. La Roe*, 160 App. Div. 819) of the 11th and 20th findings of fact made therein by the trial court.

The defendant concededly was in the employ of the testator as nurse and housekeeper on the 2d day of November, 1911, when he died. After his death she presented to the executor a duly verified claim against the estate for professional services as nurse to the testator from the 29th of April, 1907, to the 29th of April, 1908, at the rate of \$30 per week, and from the last-mentioned date to the date of his death, as nurse and housekeeper, at the rate of \$40 per week, aggregating \$8,880, less a credit of \$1,300.47, which she stated in her claim was for "payments made on account." The plaintiff's theory in the other action, as shown by the complaint therein, was that the provisions made for the defendant by the testator in his last will and testament, by which he gave her a legacy of \$4,000 and an annuity of \$1,400 for life, were in lieu of and in satisfaction of any claim she might have for services, and that having accepted and retained part of each, she had conclusively elected to take the same in satisfaction of any claim she might otherwise have had for services. The defendant, by her second amended answer, which was her last pleading in the other action, admitted payments aggregating \$2,012.78 on account of services, or over \$700 more than she credited on the claim presented to the executor, and she also thereby admitted that the testator had paid out on her account the sum of \$1,265.06, for which amount she had given credit in arriving at the balance which she claimed was owing to her. The items of moneys paid or advanced by the testator on account of the defendant, which make up the aggregate of the amount for which this action is brought, are the same items with which in the other action she so credited the estate. The other action, as appeared by the record on appeal which we reviewed, was pending and the issues upon which it was tried and decided had been joined when the complaint in this action was served. It also appeared by that record that the defense of payment had been interposed in this action, and that the issues herein had been tried and submitted to the trial court

for decision prior to the trial of the issues in the other action; and that on the trial of the issues herein the defendant had proved payment of \$500 on account of the moneys sought to be recovered herein by her check to the order of the testator, which check was also introduced in evidence on the trial of the issues in the other action. It further appeared by the other record that the defendant had in this action pleaded the pendency of the other action as a bar, and that in her account annexed to her answer in the other action she had credited the plaintiff with the amount for which she was sued herein. By the 11th finding of fact, the trial court in the other action found that the defendant had been paid on account of her claim for services, which was therein found to be \$7,054.28, the sum of \$2,010.06, which was the amount, less \$2.72, admitted by the account annexed to her answer; and by the 20th finding of fact found that there was included in such payments "the identical items and all of the items" for which the plaintiff sought a recovery in this action. Counsel for the plaintiff on the appeal in the other action argued that the correctness of the defendant's account annexed to her answer in that action had not been litigated by the plaintiff owing to the fact that the plaintiff therein made no claim for a credit therein for the amount defendant thus credited by her answer and to the further fact that plaintiff therein did not concede the disbursements therein claimed to have been made by defendant on the testator's account and that this resulted from an announcement by the trial court that if necessary a reference would be ordered to determine the correctness of defendant's account in so far as the parties failed to agree with respect thereto and that the court thereafter without notifying counsel of a change in the ruling in this respect determined without other evidence than the pleadings that her account was correct and on that basis made the findings to which reference has been made. Counsel for plaintiff also claimed that the correctness of defendant's account in so far as it em-

braced said credit was not a proper matter to be litigated in that action, but was properly an issue herein. On the review of the trial in the other action, counsel for the plaintiff, therefore, urged, in effect, that these findings be reversed on the ground that there was no evidence to sustain them, and argued that if they were not reversed the judgment might bar a recovery in this action. We accepted the theory of counsel for plaintiff in the other action and we deemed it sufficient to find generally in the other action that the defendant had been paid in full for her services, and since the parties had already tried and submitted to the court for decision the issues in this action, we determined to reverse the two findings to which reference has been made, and to substitute therefor a general finding to the effect, as contended by plaintiff, that without regard to any specific items of payment the defendant had been paid in full for the services for which she counterclaimed in that action.

The record in the action now before the court shows a trial of the issues herein since our decision of the appeal in the other action, without disclosing how the issues again came before the court for trial. At the commencement of the trial now under review the defendant's pleading evidently stood as already stated, constituting an admission of the payments or advances made on her account by the testator, with a plea of repayment by her and that the same issues were involved in the other action. The defendant, having the affirmative, proceeded to offer evidence, and at the outset the question evidently was presented as to whether under the answer the defendant could prove that the moneys were paid by the testator on account of defendant's services and were, therefore, not to be repaid. The court ruled against the defendant on that point, but permitted an amended answer to be interposed, by which the defendant abandoned all reference to the other action, and merely pleaded payment and that the moneys were advanced to apply on her claim for services. The defendant, after having offered certain of the find-

ings made in the other action, and after a question with respect to the admissibility of one of them under the answer before amendment thereof had arisen and the amended answer had been interposed as stated, offered the judgment roll in the other action, which included the order of this court and the judgment as modified in accordance therewith, and it was received in evidence. The defendant then rested, and a motion made by counsel for the plaintiff for the direction of a verdict was denied. The attorney for the plaintiff then took the stand and testified, among other things, that the claim upon which this action is based was not litigated in the other action, and that the plaintiff served a reply therein containing a general plea of payment to the defendant's counterclaim, but made no claim to a credit on account of the payments or advances herein sued for. The defendant then took the stand and gave certain general evidence, but of course was precluded by the provisions of section 829 of the Code of Civil Procedure from testifying with respect to any personal transactions between her and the testator. The case as developed by the evidence and findings on the trial of this action and the will which was received in evidence, presents the same general situation with respect to the relations between the testator and the defendant as that presented by the record on the appeal in the other action; and further evidence tending to support defendant's contention that the moneys sought to be recovered herein were expended by the testator on account of wages owing or to grow due to defendant, and were intended by him to apply thereon.

On the trial of this action part of a letter written by the testator to the firm of stockbrokers with whom the defendant's account was opened, which was not in the record on the appeal in the other action, was received in evidence, and it tends to support the view that the advances which he made for the defendant were intended to apply on her claim for services, for he therein stated, in effect, that any profit on that account

would apply on her wages and relieve him from paying therefor out of his own pocket. She evidently was not aware of the existence of that letter when she prepared her account and in the light of it her account should not be deemed an admission by her inconsistent with the letter. Notwithstanding the contentions made in behalf of the plaintiff on the appeal in the other action which resulted in the reversal of the 11th and 20th findings of fact, and the testimony of the attorney for the plaintiff on the trial of this action to the effect that the issues herein were not litigated in the other action, it is now argued by counsel for appellant that the decision of this court in the other action is *res adjudicata* that the moneys for which the plaintiff seeks to recover herein were not paid to the defendant or for her account on account of services. This contention is erroneous both as matter of fact and law. It is manifest in the circumstances that this court by the reversal of those findings merely intended that the decision should not be deemed a bar to this action, and that the parties should be left to litigate the question in this action as to whether or not the moneys paid out by the testator to or for the defendant were then or subsequently deemed by him and her to have been paid on account of wages. It is manifest, in view of the relations existing between the testator and the defendant as they changed and developed, as shown in our former opinion, that in whatever arrangement or agreement was made between them with respect to the payment for her services, the advances or payments for which a recovery is sought herein, if made for her account by the testator were taken into consideration, and that he did not intend to retain a claim against her for such moneys.

The judgment is, therefore, right, and should be affirmed, with costs.

INGRAHAM, P. J., McLAUGHLIN, DOWLING and HOTCHKISS, JJ., concurred.

Judgment affirmed, with costs.

In the Matter of the Person and Estate of HARRY BURT, an
Infant.

CARRIE BURT and Others, Respondents; WILLIAM LYNCH,
Appellant.

(Supreme Court, Appellate Division, Third Department, May 5, 1915.)

GUARDIAN AND WARD—GUARDIANSHIP OF INFANT OF TENDER YEARS.

Appeal from a decree of the Surrogate's Court appointing a general guardian of the person of an infant five years of age. The mother being dead, the father while on his death bed gave the custody of the infant to his sister, with whom the infant still resides. The proceedings were instituted by the maternal grandfather of the infant, a man of advanced years. On all the evidence, *held*, that, although both claimants to the right of guardianship were well fitted for that duty, it was proper for the court to appoint the husband of the father's sister.

APPEAL by William Lynch from a decree of the Surrogate's Court of the county of Rensselaer, entered in the office of said Surrogate's Court on the 31st day of December, 1914, appointing Frank F. Peterson general guardian of the person of Harry Burt, an infant. The appeal is on both the law and facts.

Rockwood & McKelvey (George H. Stenacher of counsel),
for the appellant.

Young & Young (W. Chase Young of counsel). for the
respondents.

PER CURIAM.—Harry Burt, the person whose custody we are now considering, is an infant about five years of age. Both of the parents of the infant are dead. The mother died when the infant was about two years old. About three weeks after the death of the mother the father placed the child in the Troy Orphan Asylum where he remained until October 6, 1914, when,

at the request of the father made on his death bed, and pursuant to a written order signed by him, the child was taken by Mabel Burt Peterson, a sister of the father, to her house at Jamestown, N. Y., where he is living now. On petition of William Lynch, the grandfather on the mother's side, proceedings were instituted in the Surrogate's Court of Rensselaer county for the appointment of the petitioner as general guardian of the person of the infant. These proceedings resulted in the appointment of Frank F. Peterson, husband of Mabel Burt Peterson, the sister of the infant's father — she being the same person into whose custody the child had been delivered by its father at the time of his last illness.

This is a strife for the possession of the infant between the relatives of the mother on the one side and the relatives of the father on the other. The evidence discloses that the parties to this controversy are all respectable and fairly well-to-do. Mr. Lynch, the grandfather on the mother's side, is in receipt of a comfortable income and could, without doubt, support the infant properly; but he is sixty-five years of age, a man somewhat advanced in life, as is also Mrs. Lynch, his wife, the grandmother on the mother's side. Frank F. Peterson, who has been appointed guardian, is forty-one years old and his wife, Mabel Burt Peterson, is ten years younger. They have no children. The grandmother of the child on the father's side resides in the household of Mr. Peterson. The Petersons own their own home in Jamestown and live well and seem to be in good circumstances. Their house is new, having been built only about a year; it is steam heated and equipped with electric lights and a bathroom. There is a schoolhouse right near their home. Mr. Peterson is engaged in the monumental business at Jamestown. Considering all these circumstances we think the learned surrogate exercised his discretion wisely in appointing Mr. Peterson guardian of the infant. The welfare of the infant is the pole star which should guide courts

in selecting a custodian for a minor child. In this instance we think this rule was observed by the surrogate. We say this, however, without any reflection upon the family of the mother of this child, for, as we have already observed, they are respectable people, in comfortable circumstances in life. The grandparents are, however, advanced in years and, in the natural order of things, even had Mr. Lynch been appointed guardian, he would have grown incompetent to bring up the child to manhood by reason of bodily infirmity. For this reason, principally, we think it was the wiser course to select Mr. Peterson to perform that duty.

The decree of the surrogate should be affirmed, without costs.

Decree of the surrogate unanimously affirmed, without costs.

ELBERT VAN COTT, Plaintiff, *v.* MORTIMER VAN COTT, JR., and
Others, Defendants.

(*Supreme Court, Appellate Division, First Department, April 16, 1915.*)

WILL CONSTRUED—TRUST FOR TWO LIVES, REMAINDERS TO SURVIVING GRAND-CHILDREN EQUALLY—STATEMENT THAT GRANDCHILDREN TAKE PER STIRPES HOSTILE TO INTENTION OF TESTATOR—DIVISION OF ESTATE ON TERMINATION OF TRUST—WHEN REMAINDERS VEST SUBJECT TO POWER OF SALE—ELECTION OF REMAINDERMEN TO TERMINATE POWER OF SALE AND TAKE REAL PROPERTY AS SUCH.

Where a testamentary trust directed an annuity to be paid to a specified person and the balance of the income from the trust property to the testator's wife, the lives of these two persons measuring the duration of the trust, and the testator further provided that on the termination of the trust the property should be sold and the proceeds paid in equal shares to his grandchildren at the decease of the wife, and to the issue of such grandchildren "*per stirpes* and not *per capita*," the same shares to be paid to the grandchildren and their issue on the death of the annuitant, should she survive the wife, the testator intended the surviving grandchildren to take in equal shares on the distribution of his estate.

Hence, a provision that the grandchildren who survived the wife shall take "*per stirpes* and not *per capita*," is meaningless and nugatory and inserted by inadvertence, being hostile to the plain intention of the testator to preserve equality among the surviving grandchildren.

It follows that where a grandchild died without issue before the termination of the trust, the share she would have taken had she survived should not be divided among her surviving brothers and sisters to the exclusion of cousins, they being also grandchildren of the testator, and thus entitled to share equally.

Where under the will the trustees on the termination of the trust had no further authority to collect rents, but merely a power to sell the corpus and distribute the same, their legal title terminated at the expiration of the trust, and passed to the devisees subject to the execution of the power of sale by the trustees. Hence, the power of sale may be terminated where the beneficiaries unite in electing to take the property as real estate.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Arthur M. Johnson, for the plaintiff and for the defendant Mortimer Van Cott, Jr.

William T. Matthies, for the defendant Harold C. Lyons.

Robert W. Candler, for the defendant Empire Trust Company.

Francis A. Winslow, for the defendants Alma B. L. Slater and others.

DOWLING, J.—The question involved in this submitted controversy is the construction to be given to certain provisions of the will of Jacob Weeks Cornwell, deceased. The particular paragraph of the will involved is the 3d, which read as follows:

"*Third.* I give and devise to my executors hereinafter named, and to their survivor and successors, the lots of land and buildings thereon erected, known by the present street numbers

313 and 315 Bowery, and numbers 5 and 7 Extra place, in the city of New York, in trust nevertheless, to have, hold and receive, and the same from time to time to rent and to collect and receive the rents and income thereof, during the life of my wife Cornelia E. Cornwell; and, after expending out of such rents and income such amounts as they may deem necessary to keep the said premises in good order and repair and properly insured against loss or damage by fire and after also paying out of the said rents and income all such other charges and expenses as shall be proper and all taxes, water rates and assessments on the said premises, then to pay out of the said rents and net income to Margaret Powell, now residing at No. 60 West 132nd Street in the City of New York, the sum of one thousand dollars annually in equal monthly payments on the first day of each month, and to pay the balance of the said rents and net incomes as collected from time to time to my said wife during her life; and to pay the whole of the said net rents and income to her after the decease of the said Margaret Powell in case she shall die before the decease of my said wife; and upon the further trust upon the death of my said wife to sell the said real properties at public auction or private sale, and good and sufficient deeds of conveyance therefor to make, execute and deliver, and the proceeds of the said sale to receive and to divide into equal shares and pay over one of said shares to each of my grandchildren, Isabella Virginia Van Cott, Mortimer Van Cott, Junior, and Elbert Van Cott (children of my daughter Ida A. Van Cott), Mildred D. Cornwell (daughter of my son Millard Filmore Cornwell), Alma B. Lyons, Harold Lyons and Cornwell Lyons (children of my deceased daughter, Clara Louise Lyons), and to their survivors at the time of the decease of my said wife *per stirpes* and not *per capita*, and to the issue of such of my said grandchildren as shall have died before the decease of my said wife *per stirpes* and not *per capita*, and so that the issue of each deceased grandchild of mine, living at the time of the death of my said wife,

shall take the part or share which his, her or their parent would have been entitled to if then living. And upon the further trust nevertheless in case said Margaret Powell shall survive my said wife, to take out of the said proceeds of sale before any division is made a sufficient sum to produce an annual net income of one thousand dollars, and then to divide and pay over only the remaining part of the said proceeds of sale as hereinabove directed, and to invest and from time to time to reinvest and keep invested during the life of said Margaret Powell the said fund so taken out of the said proceeds of sale and the interest and income thereof to collect and receive and the net interest and income thereof in equal monthly installments to apply to the use and pay over to said Margaret Powell during her life and upon her death to divide the principal of said fund and pay over the same to the same persons and in the same shares as they would have been entitled to receive the whole net proceeds of the said sale of the said real properties if said Margaret Powell had not survived my said wife, and if my said wife had died at the date of the death of the said Margaret Powell as hereinabove particularly mentioned and set forth."

Jacob Weeks Cornwell, the testator, died November 5, 1898. The will was admitted to probate by the surrogate of New York county January 31, 1899. Charles H. Ostrander and Michael J. Collins, the executors and trustees named in the will, and who qualified thereunder, died respectively January 20, 1905, and July 13, 1908, the trust created by said 3d paragraph still being unexecuted. Thereupon, on July 31, 1908, by an order of the Supreme Court, New York county, the Windsor Trust Company was appointed to execute the unexecuted trust, and thereafter the said trust company became merged in, and was succeeded by, the Empire Trust Company, which succeeded to all the rights and duties of the Windsor Trust Company. The annuitant, Margaret E. Powell, having died, the life beneficiary, Cornelia E. Cornwell, also departed this life May 17, 1914.

Meantime, and in the year 1899, Isabella Virginia Van Cott, one of the grandchildren of the testator referred to in the said 3d paragraph of his will, died without issue.

The first question presented for consideration is the respective shares which the testator's grandchildren are entitled to receive under the will. There can be no question as to the method of distribution under the first direction to the executors, which was to sell the real estate and divide the proceeds into equal shares and pay over one of said shares to each of the testator's grandchildren. This would call for a division of the proceeds into seven shares, whereof each grandchild was to receive one. But uncertainty has been caused by the addition of the remaining part of the paragraph reading: "and to their survivors at the time of the decease of my said wife *per stirpes* and not *per capita*, and to the issue of such of my said grandchildren as shall have died before the decease of my said wife *per stirpes* and not *per capita*, and so that the issue of each deceased grandchild of mine, living at the time of the death of my said wife, shall take the part or share which his, her or their parent would have been entitled to if then living." The second part of this provision, beginning with the words, "and to the issue," relates to a contingency which has not arisen, and which cannot now arise. That is, to the death of a grandchild with issue, before the death of the testator's wife. The only one of the grandchildren who died before the death of the testator's wife was Isabella V. Van Cott, who died without issue, so that this provision has no application. But it is contended that the words preceding this provision, "and to their survivors at the time of the decease of my said wife *per stirpes* and not *per capita*," indicated an intention upon the part of the testator that the division should be *per stirpes*, and that, therefore, the proceeds of sale of the real estate should be divided into three parts, whereof Mortimer Van Cott, Jr., and Elbert Van Cott, as surviving children of the testator's daughter, Ida A. Van Cott, should take one share;

Mildred D. Cornwell, as daughter of the testator's son, Millard Filmore Cornwell, should take a second share; and Alma B. Lyons, Harold Lyons and Cornwell Lyons, children of testator's deceased daughter, Clara Louise Lyons, should take the third share. Not only is this in direct opposition to the explicit language of the testator, which required his executors to divide the proceeds of sale into equal shares, and pay over one of said shares to each of his grandchildren, but it is in direct opposition to the entire plan of testator's will, and his intention as disclosed thereby, which was to put his grandchildren upon a plane of perfect equality as participants in his bounty, and to treat them alike in the distribution of his estate. Thus each of his grandchildren receives a legacy of \$1,000, there being a separately-numbered paragraph of the will (from the 6th to the 12th, inclusive) devoted to each of said grandchildren; and to each of them he left in addition to such legacy in money a specific legacy of either silver or jewelry, or a sum of money, \$200 in each case, as a substitute for such specific legacy. And where to one grandson, Cornwell Lyons, he left his largest solitaire diamond stud, convertible into a ring or pin, he expressed as a reason for so doing, and for giving him what was evidently the most valuable specific legacy, the fact that such grandson was named after the testator. Reading the 3d paragraph of the will in conjunction with the rest of it, and having in mind the testator's expressed purpose of preserving equality among his grandchildren, the words "*per stirpes* and not *per capita*," used after the phrase "and to their survivors at the time of the decease of my said wife," must be treated as meaningless and nugatory, and as inserted by inadvertence. In what manner these words came to be inserted, and whether by confusion with the following provision, cannot be determined, but it is quite certain that the equal treatment of all his grandchildren, which the testator evidently intended to effect, cannot be preserved if these words are to be given any force. For the same reason, based on testator's ex-

pressed purpose to effect equality among the grandchildren, the contention of the plaintiff and his brother cannot be sustained, that the share of their sister Isabella Virginia Van Cott should be divided between them as the surviving children of Ida A. Van Cott, to the exclusion of their cousins. This contention is based on the claim that the words "*per stirpes* and not *per capita*" when first used applied to the survivors of each class at the time of the decease of testator's wife, and as they are the sole surviving children of Ida A. Van Cott, the division of her share should be *per stirpes* and they should receive it. Not only does this transgress the testator's desire for equality among his grandchildren, but it is obvious that the scrivener of the will could have had no such intention in using words "*per stirpes*," for such language would have had no application in the case of the share left to Mildred D. Cornwell, who was the sole child of Millard Filmore Cornwell. It seems, therefore, that the sole method of carrying out the testator's expressed desire is to construe the will so as to hold that had all the grandchildren survived the testator's widow, they would each have received one-seventh of the proceeds of sale; but as one of them predeceased the widow, each of the surviving grandchildren is entitled to one-sixth thereof.

The second question raised is whether title to the real estate in question is in the trustee or whether such title terminated at the death of the life tenant, and all that remained in the trustee was a power of sale, which might be terminated by the beneficiaries through joint action. We deem the second contention the correct one. During the lifetime of the life tenant the legal title to the fee was in the trustee, which was authorized under the will during that period to collect and receive the rents and income thereof. After the death of the life tenant no further power was granted to the trustee to collect the rents, but it was simply given a power to sell. All that the trustee then had, therefore, was a power, and the real estate passed to the devisees

of the testator subject to the execution of the power. (Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], §§ 96, 97.) It follows, therefore, that the power of sale may be terminated by the united action of the beneficiaries, the six remaining grandchildren of the testator, in electing to take such real property as real estate and to terminate the power of sale. The trustee should also be directed to account for the net rents now in its hands as such trustee, and to distribute the same among the six surviving grandchildren of the testator in equal shares. It is suggested by the trustee (though the facts upon which any finding can be based are not included in the submission) that there are questions undetermined respecting, *first*, the possible imposition of a transfer tax; *second*, the lien of a mortgage upon the property made by the trustee under order of the court; *third*, the amount of compensation or commissions to the trustee. The determination of the controversy now submitted is without prejudice to these questions, which are reserved for subsequent determination.

Judgment is directed in accordance with the foregoing conclusions, without costs to any of the parties.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and HOTCHKISS, JJ., concurred.

Judgment directed in accordance with opinion, without costs. Order to be settled on notice.

In the Matter of the Estate of M. EMELINE McMILLAN, Deceased; PAULINE A. PIFFARD, Petitioner, Respondent; LOUISE C. ADENAW, as Executrix, etc., of M. EMELINE McMILLAN, Deceased, and Others, Appellant.

(*Supreme Court, Appellate Division, First Department, May 14, 1915.*)

DECEDENT'S ESTATE—AGREEMENT BETWEEN DECEDENT AND HER NIECE FOR MUTUAL MAINTENANCE OF HOME CONSTRUED—SUFFICIENCY OF EVIDENCE TO ESTABLISH SUCH AGREEMENT AFTER DEATH OF ONE OF PARTIES—INTERESTED WITNESS.

In a proceeding to have the real estate of a decedent sold for the payment of her debts, it appeared that the decedent and her niece had been very friendly for a number of years, and that the niece had lived with the decedent and contributed to the maintenance of the home, and in the absence of a will would have been entitled to one-half of her estate. Upon the marriage of the niece, it was claimed that she entered into an oral agreement with the deceased, by which she agreed to purchase an estate, repair and furnish it and establish a joint home, the deceased agreeing to pay \$100 a month for at least eight months in the year, and \$100 a month for any of the other four months in which she might remain there, with provisions in regard to horses and carriages and a maid. It was further claimed that the deceased agreed upon her death to leave to the niece a sufficient amount of property by will to produce an income equal in amount to the sum which she was to contribute annually to the support of the home, and for that purpose to leave to the niece the equivalent of the value of one-half of her interest in certain real property. The deceased moved into the new home, taking her furniture, and after living there for some time, and paying her share of the expenses, pursuant to the agreement, went away, apparently for a visit, but never returned. She died, leaving a will in which no mention was made of the niece, all her property being left to other relatives. After the deceased left the home established by the niece, but before her death, demands were made upon her for amounts due under the alleged agreement, and in a replevin action by her to recover her furniture the niece set up as a counterclaim the amounts due under the agreement.

In this proceeding the petitioner bases her claim upon the agreement and her main witness is her husband, who, having no property or business, married her when he was about fifty years of age. There were no papers containing any support of the alleged agreement, although a number of letters of the deceased were in evidence.

Held, on all the evidence, that the agreement should be sustained so far as it related to the mutual obligations of the parties during the life of the deceased, but that the evidence is insufficient to sustain the finding of any valid contract affecting the disposition of the deceased's property after her death;

That, although the petitioner's husband may not have been incompetent as a witness under section 829 of the Code of Civil Procedure, he was an interested witness and as such his testimony cannot be regarded as of a quality sufficient to support the entire agreement.

INGRAHAM, P. J., dissented, with opinion.

APPEAL by Louise C. Adenaw, as executrix, etc., and others, from a decree of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 23d day of September, 1914, confirming the report of a referee in the proceeding to have the real estate of the decedent sold for the payment of debts, directing said sale and adjudging that the estate of M. Emeline McMillan is indebted to the petitioner Pauline A. Piffard in the sum of \$69,802.69, with interest and costs.

William Ritchie of counsel (Albert Ritchie with him on the brief), for the appellants.

Timothy A. Leary of counsel (John F. Connor, attorney), for the respondent.

CLARKE, J.— This decree is based upon the finding that on or about the 30th day of October, 1898, at Geneseo, Livingston county, N. Y., the said Pauline A. Piffard and the said M. Emeline McMillan entered into an oral contract and agreement conditioned upon the subsequent purchase by said Pauline A. Piffard of the Piffard homestead, wherein and whereby it was mutually agreed by each of the parties as follows:

The said Pauline A. Piffard, on her part, agreed at her own cost and expense to purchase for a home a certain residence and property at Piffard, Livingston county, N. Y., known as the

Piffard homestead and containing about forty-two acres, together with an additional nearby parcel of land containing upwards of eighteen acres, providing the same was sold at such a price as to come within her means; to put the said homestead in good repair and maintain the same as a home for herself and the said M. Emeline McMillan during the latter's lifetime; to give the said M. Emeline McMillan first choice of the rooms in the said house for use as her private apartments as well as the general use of the premises as one of the family; to provide the said M. Emeline McMillan with barn room for carriage and wagons; to provide stabling for the horses of the said M. Emeline McMillan and to support these horses for her, charging her no more than the actual cost of so doing; to cater and provide for the table so as to meet with the needs and desires of the said M. Emeline McMillan; to provide and keep a man on the premises whose duties should be those of a gardener, chore man in and about the house and farm, and that when the man needed additional help in carrying on the work on and about the place, in the way of men and teams, to provide the same at her own expense; to purchase and maintain on said place a sufficient number of cows to keep the establishment in milk, cream and butter, and a sufficient number of fowls to supply eggs and young poultry for the said home; to manage a large garden upon the said place containing about an acre and a half of land so as to supply the said family with all necessary vegetables, small fruits and flowers for their support and comfort; to provide all necessary additional furniture to comfortably furnish the said house after the said M. Emeline McMillan had placed therein the furniture and other household belongings she had in the Colt house, in Geneseo, N. Y.; to maintain such furniture in good repair, and from time to time, as the same became worn or unfit for use, to replace them at her own expense; and to provide the necessary help to maintain and run said household.

The said M. Emeline McMillan, upon her part, contracted and

agreed in the event said Pauline A. Piffard should purchase the said Piffard homestead to go to the said Piffard homestead with the said Pauline A. Piffard and her family and make her home there during the balance of her life; to pay the said Pauline A. Piffard \$100 a month for eight months of each year for the maintenance of said home, and if the said M. Emeline McMillan remained therein for a greater period of time than eight months in any one year, to further pay the said Pauline A. Piffard at the rate of \$100 per month for each month of such overtime; to place in the said home the furniture and other household belongings which the said M. Emeline McMillan then had in the said Colt house in Geneseo, N. Y., and contribute them so far as they would go toward the furnishing of said new home; to leave such furniture there during her lifetime, and that at the death of said M. Emeline McMillan the said furniture was to become the property of the said Pauline A. Piffard, excepting such articles of furniture and bric-a-brac as the said M. Emeline McMillan wished to give away to other members of her family and friends for keepsakes; that she should not cause to be removed from any one room for that purpose a sufficient amount of furniture to deplete the furnishing of that room; to keep a maid to wait upon and take care of her, the said M. Emeline McMillan, and to have the said maid do a sufficient amount of work in the said household to pay for the said maid's board; to purchase horses and a carriage with the necessary equipment for the same and to maintain them and to employ a coachman for the general use of the said family; and when she, the said M. Emeline McMillan, died, to leave to the said Pauline A. Piffard a sufficient amount of property by will to produce an annual income equal in amount to the sum which she was to contribute annually towards the support of said home so that the said Pauline A. Piffard could continue the said home after the death of the said M. Emeline McMillan in the same fashion as during the latter's lifetime, and for that purpose to leave to the said

Pauline A. Piffard the equivalent, in cash or other securities, of the value of one-half of a two hundred and eighty-seven twelve hundredths undivided interest in the aforesaid real property, located at 152 Broadway in the city of New York, reserving the privilege or option, however, of satisfying this obligation by leaving to the said Pauline A. Piffard instead of such cash or other securities, one-half of the said undivided interest in said real property itself and that she had, as petitioner then knew, theretofore made a will in which she had given petitioner one-half of her interest in the real estate known as No. 152 Broadway, New York city.

Mrs. Piffard was a niece of Mrs. McMillan, and if she had died intestate would have been entitled to one-half of her estate. Mrs. McMillan was born in 1832. In 1885 Mrs. McMillan and her niece, then Pauline Arthur, were together in Rome, Italy, where Pauline's mother had died. For many years thereafter she and her niece traveled and lived together. They had at one time a family home in Washington, D. C., which was broken up by several deaths. They had a home in Geneseo, N. Y., which Mrs. McMillan maintained and conducted, to the upkeep of which the niece contributed. In February, 1898, Miss Arthur married D. Halsey Piffard. The contract set forth *supra* was alleged to have been made in November, 1898. It involved the purchase of the property known as the Piffard estate by Mrs. Piffard for some \$5,000, the repair and furnishing thereof which cost about \$6,000 more, and the setting up of a joint home; Mrs. McMillan to pay \$100 a month for at least eight months in the year, and \$100 a month for any of the other four months in which she might remain there, and with provisions in regard to horses and carriages and a maid. The property was bought and repaired. Mrs. McMillan took her furniture there. Mr. and Mrs. Piffard and Mrs. McMillan moved into the house in May, 1899, and lived on this property from that time down to October, 1902, when Mrs. McMillan went away,

apparently for a visit, taking a few of her things. She never returned to reside there. She died in 1907, leaving a will in which no mention was made of Mrs. Piffard. All her property was left to her other relatives.

In 1904 Mrs. Piffard's attorney sent to Mrs. McMillan the following written demand: "The undersigned hereby demands from you that you fulfill and carry out your contract, made with her on or about November 2, 1898, and that you pay to her the sum of \$1,750, with interest thereon, from the first day of June, 1904, as an amount due under the aforesaid contract, the items of which may be more particularly set forth as follows:

" To maintenance or contribution toward the home at the rate of \$100 per month for eight months.....	\$800
" For damages by reason of your failure to furnish for the use of the home a carriage, team or conveyance with proper equipment, and a man to care for the same and to render services in and about the home and premises, and for your failure and neglect to furnish a maid to render services in and about the premises, under the provisions of your said contract, in the sum of.....	\$950
	<hr/>
	\$1,750
	<hr/>

" Dated August 2, 1904."

And in August, 1905, another demand was sent to Mrs. McMillan in the same form with the addition of this claim: "The undersigned likewise demands the sum of \$1,750, heretofore demanded from you, with interest thereon from June 1, 1904."

This case is differentiated from many of the cases under which similar contracts have attempted to be established in the courts, after the death of the testator, in the fact that these

demands were made in her lifetime and that in April, 1906, Mrs. McMillan brought suit in the Supreme Court, county of Livingston, against Mr. and Mrs. Piffard in replevin for her furniture which remained in the house after her departure in 1902, valuing said chattels at \$2,215.70, and that in the answer in said suit Mrs. Piffard set up as a counterclaim this oral agreement.

Mrs. McMillan's testimony *de bene esse* was taken before a referee, and, upon trial of that replevin suit, so much of it as applied to the ownership and possession of the chattels sued for was read in evidence, she having died before the trial. The trial court, over objection to its competency under section 829 of the Code of Civil Procedure, admitted the testimony of Mrs. Piffard in regard to that contract and other personal communications to and transactions with Mrs. McMillan upon the ground that the door had been opened, not only in regard to the chattels, that is to say, in defense of the cause of action, but in support of the counterclaim. Upon that trial defendants had a verdict upon the counterclaim for \$55,818.92, on which judgment was entered for nearly \$60,000. Upon appeal to the Appellate Division (*Adenaw v. Piffard*, 137 App. Div. 470) this judgment was affirmed by a divided court. The main point discussed was the admission of Mrs. Piffard's testimony. The majority of the court said also (2) "We think the counterclaim maintainable, though plaintiff's testatrix was living when the action was commenced. She having refused to carry it out repudiated it."

Presiding Justice McLENNAN, with whom Justice KRUSE concurred, dissented, writing an opinion holding said testimony inadmissible, also saying: "I think also that there was no consideration for the agreement which is the basis of defendants' counterclaim in this action. By the terms of the alleged agreement entered into between the deceased and the defendants, provision was made for ample payment by the deceased for all

services rendered to her. Her board and that of her maid, the care of the horses, wagons and coachman were all provided for by the terms of the oral agreement. It is not suggested that the payments so agreed to be made by the deceased were not ample for the services rendered, and I think it cannot be determined, even construing the evidence of the defendants most favorably to them, that there was any consideration for the alleged agreement on the part of the deceased to will or transfer to them upon her death property of the value of between \$50,000 and \$60,000. Finally, I conclude that the defendants did not establish their alleged counterclaim by such proof as would entitle them to recover under the rule as laid down by the Court of Appeals in *Hamlin v. Stevens* (177 N. Y. 39)."

On appeal to the Court of Appeals (202 N. Y. 122) the judgment of the Appellate Division was reversed by a unanimous court, WILLARD BARTLETT, J., writing, and it was held that the evidence was clearly inadmissible and that the door had not been opened to permit Mrs. Piffard to testify as to the alleged counterclaim. The court *inter alia* used this significant language: "This record presents a striking illustration of the perils of litigation. An old lady commences a lawsuit to recover possession of \$2,000 worth of personal property, and as the outcome her estate is cast in damages in the sum of nearly \$60,000."

In this proceeding the main witness for the petitioner is her husband, D. Halsey Piffard, sixty-four years of age, who, having known Miss Arthur all her life, married her when he was upwards of fifty, he then having no property or business and never having had any since. His testimony, direct and cross, takes up 249 pages of the record.

The other testimony was given by a sewing woman, Miss Mary E. Hennessy, who went to take care of Mrs. McMillan in 1900 and was with her for five weeks. She testified that on the first day of their acquaintance Mrs. McMillan said to her:

"I have divided my silver during my lifetime so I know where it goes." "And I said to her, 'Is not Mrs. Piffard your daughter?' She said, 'No, she is my sister's daughter.' I said, 'Then she is not your only heir?' She said, 'No, I have five living relatives. I have Mrs. Piffard and my brother John and he has three children, but Mrs. Piffard lived with me since her mother's death and at my death Mrs. Piffard is to inherit one-half of my property and my brother John and his family the other half, and she gets the greater share because she gets the bulk of this furniture.'" On the next day she testified that she asked Mrs. McMillan if she did not own the house. "She said 'no, Mrs. Piffard put her money in the house and it was all her money that bought the house,' and she said 'I agreed to furnish it and contribute toward the maintenance of it as she did with me when I lived in Geneseo.' She said that before then she had kept house at Geneseo and Mrs. Piffard had lived with her and given her a yearly allowance. She said, 'I kept house and Mrs. Piffard gave me an allowance yearly and now I am in feeble health and I do the same by her, I contribute.' She did not say what amount. She said 'I contribute for the maintenance of the house.'" The witness further testified that in 1904 she saw Mrs. McMillan at Lauderdale's house on an occasion when a registered letter came containing the demand from Mrs. Piffard. "Mrs. McMillan * * * said, 'I have told Mrs. Piffard I would leave her one-half of my property and my brother John one-half.'" That in 1905, three years after Mrs. McMillan had left the Piffard house after a partition suit had been tried and before the trial of the replevin suit, "She [Mrs. McMillan] was speaking about leaving the Piffard homestead. She said, 'I was given to understand that a verbal contract was not binding,' and she said 'if a verbal contract is binding why I have lost one suit and I probably will another.'"

Ellen Long, a nurse, testified that in April, 1899, Mrs. Mc-

Millan was talking to her about moving over to the Piffard homestead, and she said "that she had agreed to leave enough property to maintain * * * the Piffard home. She told me about Mrs. Piffard going over to buy the home and how she agreed to leave property enough to maintain that home just the same after her death as she promised to now."

Upon the trial of the replevin suit four years earlier she had not testified to any such conversation.

Elizabeth Schneider, cook, testified that Mrs. McMillan in conversations in reference to her relations with Mrs. Piffard "told me she was very dear to her, just as her own child, in place of her own child who had died. * * * I don't think she mentioned the furniture in particular. She told me everything would be Mrs. Piffard's. She used the word 'everything.' We were talking about a very beautiful picture that was in Mrs. McMillan's room. * * * She said it would be Mrs. Piffard's when she was gone and that everything would be." This testimony does not seem at all to corroborate the contract alleged.

Hannah Roberts, a nurse, was at Piffards five or six weeks in 1901. She was asked, "What did [Mrs. McMillan] say about the furniture? * * * A. She said she had taken it there to furnish the house while she was living, and when she got through with it Mrs. Piffard had it. * * * Q. What did she say to you in reference to an agreement she had made with Mrs. Piffard as to other property? A. She didn't say anything, only what was there would be Mrs. Piffard's. Q. Did you have any conversation about other property? A. No, sir."

This is the utmost of the corroboration of Mr. Piffard's story. There is not a scrap of paper containing any support of the alleged contract, although a number of letters of Mrs. McMillan are in evidence. The judgment, therefore, depends upon the evidence of Mr. Piffard.

It is urged that his testimony is incompetent under section 829 of the Code of Civil Procedure, as "a person interested in the event." I am not willing to say that he comes within the condemnation of the statute as a party legally interested in the event, but I do think that he was an interested witness and that as such his testimony cannot be regarded as of a quality sufficient to support the judgment under the rule laid down in similar cases.

In *Hamlin v. Stevens* (177 N. Y. 39) the claimant's mother testified to the alleged contract. Judge VANN said: "Assuming that the trial judge believed that the appellant and his mother intended to tell the truth, still, owing to their deep interest, it would be unsafe to base a finding on their testimony when it may be followed by such grave consequences. Such contracts are dangerous. They threaten the security of estates and throw doubt upon the power of a man to do what he wills with his own. The savings of a lifetime may be taken away from his heirs by the testimony of witnesses who speak under the strongest bias and the greatest temptation, with all the dangers which, as experience shows, surround such evidence. The truth may be in them, but it is against sound policy to accept their statements as true, under the circumstances and with the results pointed out. Such contracts should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. * * * We wish to be emphatic upon the subject, for we are impressed with the danger, and aim to protect the community from the spoliation of dead men's estates by proof of such contracts through parol evidence given by interested witnesses."

In *Holt v. Tuite* (188 N. Y. 17), where the rule in *Hamlin v. Stevens* was applied, the witnesses whose testimony was disregarded as being interested were in no way legally interested in the estate or the property nor related by kinship to the par-

ties. They were merely involved in certain disputes calculated to excite their ill will against the heirs or representatives of the estate.

In *Hungerford v. Snow* (129 App. Div. 816) the husband testified to the oral agreement. While the court held that his testimony was competent, it held that the defendant had failed to establish the oral agreement by such clear and convincing evidence as is required under the rule applicable to cases of this kind. In *Scheu v. Blum* (119 App. Div. 827) the court said: "The existence of the alleged contract of employment depends upon the testimony of her husband. There is no substantial corroboration. Contracts of this kind are looked upon with suspicion and whenever sought to be enforced are closely scrutinized and never sustained unless the evidence is very satisfactory. [Citing cases.] The plaintiff's husband can hardly be said to have been a disinterested witness."

In *Dueser v. Meyer* (129 App. Div. 598) the testimony was given by the plaintiff's wife and the judgment was reversed upon the ground that such claims have to be proved by clear and convincing evidence of disinterested witnesses before they can be allowed.

In *Butcher v. Geissenhaimer* (125 App. Div. 272), where the claimant and the witness were sisters, the court said: "It may be granted that there was some evidence tending to establish the contract, and in an ordinary case enough to go to a jury. But the Court of Appeals has established the rule that in this class of cases the testimony must be not only clear and convincing, but of the clearest and most convincing character, and given or corroborated in all substantial particulars by disinterested witnesses, and it must follow that in order to take such a case to a jury more is required than will ordinarily suffice." And the judgment was reversed.

In *White v. Devendorf* (127 App. Div. 791) the rule was applied to the testimony of relatives.

It is not necessary to reject Mr. Piffard's testimony entirely. Undoubtedly the relations of aunt and niece had been very close for a number of years. They had traveled and lived together almost continuously from 1885, when her mother died. They had lived together in Geneseo, where Mrs. Piffard had contributed to the maintenance of the home, and it is clearly established when the Piffard homestead was bought and they moved there that Mrs. McMillan contributed to the maintenance of that home. As Mrs. McMillan grew older and feeble, suffering as she did from shaking palsy and requiring considerable attention, there is no doubt that Mrs. Piffard was affectionate, considerate and helpful to her. There is no claim for personal services rendered to Mrs. McMillan, so that there is not here presented the question of a contract for personal services or an action in *quantum meruit*. The contract alleged is for contribution to the maintenance of the home. I think that there was an agreement founded upon sufficient consideration whereby Mrs. McMillan agreed to make her home with her niece for the rest of her life and to pay her \$100 a month for eight months in the year, and \$100 a month for so much of the other four months as she should actually be in the home, and to provide for the horses and carriages and their keep, etc.

After her departure from the Piffard home in October, 1902, she continued to pay for the keep of the horses until she disposed of them in March, 1903, and she continued to make the contribution of \$100 a month until May, 1903.

The court found that Mrs. McMillan neglected and failed to comply with the terms of her contract by omitting and neglecting to pay the sum agreed upon for the maintenance of said joint home and by neglecting and omitting to furnish and maintain for the use of said household the team, coachman, carriage and equipment for the year beginning June 1, 1903, and ending June 1, 1904, and by reason of said failure and neglect became indebted to Mrs. Piffard in the sum of \$1,600, less the

sum of \$156, the value of the board of which Mrs. Piffard was relieved during said year, leaving a total of \$1,444, and has made the same finding for each of the four years down to June 1, 1907, which would make a total of \$5,776. We think that justice would be done by accepting so much of the testimony as would establish the contract so far as it related to the mutual obligation of the parties during the life of Mrs. McMillan. We do not feel justified in finding any valid contract affecting the disposition of Mrs. McMillan's property after her death. It may be conceded that Mrs. McMillan had at various times, and perhaps for a long time, an intention to leave part of her estate to this niece, yet the circumstances of her going to the Piffard house and the contribution to the maintenance thereof were in entire accord with their previous conduct, and can be entirely explained without referring to the disposition by will of one-half of her property. Within the rule, we find no evidence of the character required sustaining the finding of the court that Mrs. McMillan contracted at her death to leave any of her property to Mrs. Piffard.

Therefore, the tenth, twelfth, sixteenth, thirty-fourth and fortieth findings of fact should be modified, thirty-second and forty-eighth reversed, and the fourth conclusion of law modified.

The decree appealed from should be modified by providing that the amount justly due to the petitioner is \$5,776, with interest on \$1,444 from the 1st day of June, 1904; interest on \$1,444 from the 1st day of June, 1905; interest on \$1,444 from the 1st day of June, 1906, and interest on \$1,444 from the 1st day of June, 1907, and as modified affirmed, without costs.

McLAUGHLIN, SCOTT and HOTCHKISS, JJ., concurred; INGRAHAM, P. J., dissented.

INGRAHAM, P. J. (dissenting.)— The statement of the testimony by my brother CLARKE and the authorities cited by him establish, I think, that no contract was proved which would justify the court in enforcing it against the personal representatives of the estate. The only substantial evidence of any contract came from the plaintiff's husband, who had no occupation or business and no property, and apparently was supported entirely by his wife, the petitioner in this proceeding. While his testimony may not be incompetent, he was certainly as much interested as the petitioner, whose testimony is incompetent, and as I read it it fails to establish any contract by the decedent to live with the petitioner during her life and pay half the expenses of the establishment which the plaintiff was to provide or to make any provision for the petitioner by will. Undoubtedly if believed it would establish an intention of the decedent to live with the petitioner, but as I look at it it fails to show any enforceable contract made by her to continue such arrangement for any period. The so-called corroborative evidence consists of declarations of decedent as to her intentions, and as I look at it, fails to corroborate the claims of the petitioner that any express contract was made. Now the proof of the alleged contract in case seems to me to be within the principle established in *Hamlin v. Stevens* (177 N. Y. 39) where the court said: "Such contracts should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. * * * We wish to be emphatic upon the subject, for we are impressed with the danger, and aim to protect the community from the spoliation of dead men's estates by proof of such contracts through parol evidence given by interested witnesses." And the same principle has been now firmly established in this State and shown in many cases, some of which are mentioned in the prevailing opinion. Certainly in this case there was not

such testimony of a contract as was required by the Court of Appeals in *Hamlin v. Stevens* (*supra*) as a basis for a claim against the estate of a decedent, and I think, therefore, the decree of the surrogate should be reversed and the proceedings dismissed.

Decree modified as directed in opinion, and as modified affirmed, without costs. Order to be settled on notice.

LOUIS STIEGLITZ, as Administrator with the Will Annexed, etc., of LIZETTE SINSHEIMER, Late of the City of New York, Deceased, Plaintiff, *v.* THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK, JOHANNA SINSHEIMER et al., Defendants.

(*Supreme Court, New York Special Term, June, 1915.*)

WILLS—DOMICILE—GIFT OF PERSONAL ESTATE TO FOREIGN TRUSTEES—CREATION OF ENDOWMENT—WHEN COURTS OF THIS STATE WILL NOT INTERPOSE TO PREVENT CARRYING OUT OF DISPOSITIONS MADE BY WILL.

When a citizen of this State, or a person domiciled here, makes a gift of personal estate to foreign trustees for the purposes of a foreign charity our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property but will inquire first whether all the forms and requisites necessary to constitute a valid testamentary instrument under our law have been complied with, and, second, whether the foreign trustees are competent to take the gift for the purposes expressed and to administer the trust under the law of the country where the gift is to take effect.

In 1867 a testatrix, then a resident of this State, returned to Germany where she was born, and remained there until her death, and while there she made her will creating an endowment for the purpose of giving maidens related to her a dowry at their marriage and also an endowment to contribute to the education of young persons and students of a college or a polytechnical school; the trusts so created were to be executed in Germany. *Held*, that assuming that the laws of Germany would permit the carrying out of the trusts, no proof to the contrary having been offered, the courts of this State would not interpose the laws of this State to prevent the disposition made by testatrix from being carried out.

ACTION for the construction of a will.

Arthur L. Strasser (Walter J. Rose, of counsel), for plaintiff.

Fiorello H. La Guardia, deputy attorney-general, for attorney-general.

Chas. S. Sinsheimer, for defendants Benjamin L. Sinsheimer et al.

Herman S. Bachrach, for defendants Hannah Sinsheimer et al.

Edgar A. Pollack, for defendants Sophie Pollack et al.

NEWBURGER, J.— This is an action for the construction of the will and codicil of Lizette Sinsheimer. The will was made in the city of Worms, duchy of Hesse, Germany, on the 10th day of December, 1881, and the codicil executed at the same place on the 22d day of January, 1890. The will and codicil were established and probated under a decree of this court on the 27th day of July, 1914. The decedent, while formerly a resident of this State, had, in 1867, returned to the city of Worms, Germany, of which city she was a native, and remained there until her death. Paragraph 4 of the decedent's will creates an endowment known as the Sinsheimer bridal legacy, for the purpose of giving maidens related to the testatrix a dowry at their marriage, and also an endowment, to be known as the Sinsheimer family stipendium, for the purpose of contributing to the education of young persons, without regard to sex, recommended by their teachers, and students of a college or a polytechnical school. The decedent's long residence in the city of Worms must be considered in determining the scheme of the dispositions contained in her will and codicil. The trusts created were to be executed

in the city of Worms, and assuming that the laws of Germany permit the carrying out of such trusts, no proof to the contrary having been offered, this court will not interpose the laws of this State to prevent the disposition made by the testatrix from being carried out. As was said by Mr. Justice O'BRIEN in *Hope v. Brewer* (136 N. Y. 137): "But I have not been able to find any well-considered case, in which the question was directly involved where a gift to a foreign charity in trust, contained in a valid testamentary instrument, has been held void, where there was a trustee competent to take and hold, and the trust was capable of being executed and enforced, according to the law of the place to which the property was to be transmitted under the will of the donor. The law of this State inhibiting the creation of trusts not expressly authorized by statute and the suspension of the power of alienation of real estate and the absolute ownership of personal property, is founded upon a public policy of our own. * * * It is not a matter of any public concern whatever to this State whether the personal property of a person domiciled here shall pass to his heirs or next of kin in a foreign country, or to trustees in trust for charity residing there, or even to a foreign corporation for purposes of charity. (*Vansant v. Roberts*, 3 Md. 119.) Our law with respect to the creation of trusts, the suspension of the power of alienation of real estate, and the absolute ownership of personal, was designed only to regulate the holding of property under our laws and in our State, and a trust intended to take effect in another State, or in a foreign country, would not seem to be within either its letter or spirit. When a citizen of this State, or a person domiciled here, makes a gift of personal estate to foreign trustees for the purpose of a foreign charity, our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property, but will inquire as to two things: *First*, whether all the forms and requisites necessary to constitute a valid testamentary instru-

ment, under our law, have been complied with; and, *second*, whether the foreign trustees are competent to take the gift for the purposes expressed, and to administer the trust under the law of the country where the gift was to take effect, or, as Judge RAPALLO stated, the rule with respect to gifts to charity generally, the inquiry is 'whether the grantor or devisor of a fund designed for charity is competent to give, and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift' (*Holland v. Alcock*, *supra*, p. 337).” And at page 140 he says: “In the leading case of *Chamberlain v. Chamberlain* (43 N. Y. 424), ALLEN, J., discussing the question, said: ‘The courts of this State will not administer a foreign charity, but they will direct money devoted to it to be paid over to the proper parties, leaving it to the courts of the State within which the charity is to be established, to provide for its due administration and for the proper application of the legacy (*Hill on Trustees*, 468; 2 Story on Equity Jurisdiction, § 430; *Provost v. Edinburgh v. Aubery*, Ambler, 236; *Burbany v. Whitney*, 24 Pick. 154; *Attorney-General v. Lepine*, 2 Swanst. 181).’” (See, also, *Mount v. Tuttle*, 183 N. Y. 358; *Robb v. Washington & Jefferson College*, 185 id. 496; *St. John v. Andrews Inst.*, 191 id. 254.) The complaint must be dismissed.

Complaint dismissed.

GIFT TO FOREIGN CHARITY IN TRUST.

1. When a citizen of this State, or a person domiciled here, makes a gift of personal estate to foreign trustees for the purpose of a foreign charity, our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property but will inquire as to two things, first, whether all the forms and requisites necessary to constitute a valid testamentary instrument under our law have been complied with, and second, whether the foreign trustees are competent to take the gift for the purposes expressed and to administer the trust under the law of the country where the gift is to take effect. (*Hope v. Brewer*, 136 N. Y. 126-138.)

2. This case was applied by analogy to a legacy directly to an unincorporated religious society in a foreign state. (*Bermardston Cong. Unitarian Soc. v. Hale*, 29 App. Div. 400.)

3. Also to a Connecticut religious society holding that it was capable of taking as the purposes for which they were made were among those for the promotion and furtherance of which the society was organized. (*Matter of Leo Wolf*, 25 Misc. 470.)

4. The trend of the case is unquestionably toward the conclusion that our statutes applied to domestic wills that by these provisions were to be executed here, and that an accumulation to take effect in another country or a bequest made there to take effect here was not within the intention of the legislature when such statement was framed. (*Dammert v. Osborne*, 140 N. Y. 41.)

5. The doctrine enunciated in *Hope v. Brewer* affirmed that laid down in *Kerr v. Dougherty*, 79 N. Y. 327, and simply held that bequests valid at testator's residence were valid everywhere, if the legatees had legal capacity to take and administer the bequests. (*Matter of Robertson*, 23 Misc. 454.)

6. A bequest made by a resident testatrix to municipal authorities of a Massachusetts town, for charitable purposes, held void, there being no one presently able to receive and administer the bequest.

CARSON BREVOORT, HENRY R. BREVOORT and JOHN L. BREVOORT, Plaintiffs, v. EMMA G. TOWNSEND and MARY T. RENNARD, as Executrices, etc., and Others, Defendants.

(*Supreme Court, New York Special Term, June, 1915.*)

WILLS—CONSTRUCTION OF—SUSPENSION OF POWER OF ALIENATION—LIFE TENANT—JOINT DEED—REMAINDERMEN.

In 1847 L. died leaving a will devising certain real estate to his daughter for life, with remainder to her "issue" in equal shares, and in the event of her leaving no "issue" there was given an alternative devise in remainder to a niece and nephews if they survived her. The life tenant died in 1895 survived by three grandchildren but no children, her only child, a son, having died in 1894. On June 3, 1892, the life tenant and her son, his wife joining in the deed, conveyed the real estate in fee to defendants' testator who forthwith took possession and collected the rents until his death. On June 20, 1892, defendants' testator purchased a tax lease of the property for a term of twenty-nine years from January 12, 1892, and he and his executrices collected the rents.

In an action by the grandchildren of the life tenant for an accounting of rents collected under the tax lease there was no intimation of any alleged invalidity or illegality thereof, nor was there an allegation of any actual fraud or the taking of any actual undue advantage by defendants' testator, but the claim was made that he was either a tenant in common with plaintiffs or a mere assignee of the life estate, and as such it was alleged that any right or title he might have acquired under the tax lease inured to the benefit of the remaindermen. Defendants' testator paid no taxes upon the property and plaintiffs made no demand for an accounting or redemption until June, 1914. *Held:*

That a contention that the will of L. was invalid as suspending the power of alienation beyond two lives in being was without merit as the suspension was only during the life of the life tenant.

That the son of the life tenant had a defeasible vested interest in the remainder with plaintiffs which was divested by his death at which time the remainder vested in plaintiffs absolutely.

That defendants' testator acquired by the joint deed, so far as the life tenant's son and his wife were concerned, such interest only as the son had, viz.: an interest subject to be divested by his death before the life tenant.

That as at the time of the execution of the joint deed the life tenant's son had no right of present possession the entry and possession of defendants' testator was acquired from and as grantee of the life tenant.

That defendants' testator as purchaser of the life estate held his title in subordination and not in hostility to the title of the remaindermen and could not either as the successor of the life tenant or even as a cotenant with plaintiffs in the remainder rightfully purchase the lease for his exclusive benefit and it inured to the common benefit, and that plaintiffs were entitled to an interlocutory decree to that effect.

ACTION for an accounting.

DeWitt V. D. Reiley, for plaintiffs.

Delos McCurdy and Joline, Larkin & Rathbone, for defendants.

GUY, J.— The action was brought for an accounting of rents collected under a tax lease of No. 161 Front street, purchased by defendants' testator in 1892, which tax lease expired January 12, 1915. Plaintiffs ask that the defendants and their testator

be adjudged to have purchased and held said tax lease upon an implied trust for plaintiffs' benefit, and that an accounting by defendants be ordered of the rents and profits of No. 161 Front street, during the term of the tax lease, and a receiver appointed to collect all further rents. The complaint does not ask judgment either for a reconveyance, sale or partition of the property, nor does it ask that defendants be ejected or ousted therefrom, or for the determination of any question of title to the realty. In 1847 one Lefferts, the then owner of the property, died leaving a will devising a life estate therein to his daughter, Eliabeth Dorothea, and devising, after her decease, the remainder to her "issue" in equal shares, and, in case she left no "issue," an alternative devise in remainder to a niece and nephews if they survived her. The life tenant died in 1895, leaving her surviving three grandchildren, the plaintiffs herein, but no children. The life tenant's only child, a son, who was the father of the plaintiffs, died in 1894, one year prior to the death of the life tenant. On June 3, 1892, with an only son and three grandchildren then living, the grandchildren being the plaintiffs in this action, who at that time were all minors, the life tenant and her only son (the son's wife joining in the conveyance) conveyed the property to defendants' testator in fee for the expressed consideration of \$5,000. Defendants' testator forthwith took possession thereunder and collected the rents until his death. On June 20, 1892, defendants' testator purchased for \$2,500 a tax lease of the property for the term of twenty-nine years from January 12, 1892, from the then holder thereof. Defendants' testator and his executrices have collected the rents ever since, amounting, it is claimed, to over \$43,000. There is no intimation of any alleged invalidity or illegality of the tax lease. There is no averment of any actual fraud or the taking of any actual undue advantage by defendants' testator; but it is claimed by plaintiffs that defendants' testator was a tenant in common with plaintiffs or else was a mere assignee of the life

tenant's life estate, and as such it is alleged that any right or title he might acquire under the tax lease inured to the remaindermen's benefit. After entering into possession defendants' testator paid no taxes upon the property, and apparently contemplated strengthening his title by a further and later tax sale. Plaintiffs made no demand for an accounting or redemption until June, 1914. It is contended by defendants that the Lefferts will was invalid, as the power of alienation was suspended for more than two lives in being. There is no merit in this contention. The suspension was only during the life of the life tenant. Upon her death it vested immediately in the remaindermen. The word "issue" as used in this will includes the son of the life tenant and his children, and the devise therein in remainder to the life tenant's issue upon and after her death gave to them a vested interest in the remainder as tenants in common, dependent upon the life estate. This interest, however, was subject to curtailment by the birth of other "issue," who would be entitled to share under the terms of this will in the remainder, and the interest of each was subject to the contingency that it might be wholly defeated by his or her death before the life tenant. (*Schmidt v. Jewett*, 127 App. Div. 376, 389; *affd.*, 195 N. Y. 486, 490, 492; *Soper v. Brown*, 136 id. 244, 249, 251; *Drake v. Drake*, 134 id. 220, 224, 227; *Campbell v. Stokes*, 142 id. 23, 29, 30; *Jackson v. Littel*, 56 id. 111.) According to the rules laid down in the above cases the son of the life tenant, who joined with the life tenant in the deed to defendants' testator, had a defeasible vested interest in the remainder with these plaintiffs, and his death in 1894 before that of the life tenant in 1895 divested him of his interest, and the plaintiffs herein having survived the life tenant, and being the only issue living at her death, the remainder vested in them at that time absolutely. Defendants' testator therefor acquired by the joint deed, so far as the life tenant's son and his wife are concerned, such interest only as the son had, viz., an interest

subject to be divested and which was subsequently divested by his death before the life tenant. At the time of the deed to defendants' testator the life tenant's son, who was then vested with only a defeasible right as a remainderman, had no right of present possession and could have none until the death of the life tenant, and could not, therefore, at that time convey any right of present possession. The entry and possession by defendants' testator was, therefore, acquired from and as grantee of the life tenant under the joint deed and this entry and possession is presumed to be in conformity to that title, viz., the life tenant conveyed the life estate which she owned and defendants' testator took a commensurate possession and that only. The conveyance by the life tenant, while in terms apparently inconsistent with the title of those in remainder, was in reality not so. She could convey a life estate; by her deed she did convey it. The grantee became the owner, and his possession under the deed was just what that instrument effectively conveyed. Both deed and possession were consistent with the rights of the remaindermen. (Culver v. Rhodes, 87 N. Y. 348.) Defendants' testator's possession was that of the life tenant, and his interests that of the life tenant and of one interested defeasibly, in common with others, in the remainder. As the purchaser of the life estate he held his title in subordination and not in hostility to the title of the remaindermen, and he could not, either as the successor of the life tenant or even as a cotenant with the plaintiffs in the remainder, rightfully purchase the lease for his exclusive benefit. The lease purchased inured to the common benefit. (Burhans v. Van Zandt, 7 N. Y. 523, 527; Clark v. Kirkland, 133 App. Div. 83.) Plaintiffs should have an interlocutory decree that the purchase of the tax lease by defendants' testator inured to the common benefit and directing an accounting to determine the amount due to defendants from plaintiffs as the *pro rata* share of the costs of the purchase of the tax lease, with interest from the life tenant's death until the expiration of the

tax lease, January 12, 1915, and the amount due from the defendants to plaintiffs as the entire net rents of the premises until the expiration of the tax lease, with interest to the expiration thereof.

Judgment accordingly.

Matter of the Judicial Settlement of the Accounts of the Administrator of the Estate of JAMES FARLEY, Deceased.

(Surrogate's Court, Clinton County, March, 1915.)

MARRIAGE—PRESUMPTION OF*—EVIDENCE—CODE CIV. PRO., § 829.

Persons holding themselves out as husband and wife are presumed to be married, and if the proof be confined to cohabitation and the declarations of the parties up to the time of their separation their marriage may be accepted as a fact, but the evidence dealing with the inception of the relation may preclude the extension of the presumption of legitimacy thereto.

Where there was no formal proof of a marriage between claimant's assignor and decedent whose union had its inception in a State the laws of which required the "solemnizing" of marriage, and their relationship finally culminated in less than four years from its inception, and their occasional semi-clandestine meetings thereafter terminated three years later without death or divorce intervening to sever them, and there is no proof that decedent supported claimant's assignor after their separation, or of any legal proceeding by way of divorce or for non-support on her part, though she knew decedent was wealthy, the evidence does not require the court to indulge the presumption that the illicit relations were transformed by marriage, but rather sanctions the presumption that a relation illicit in its origin continued such until its termination in discord and separation. A claim against his estate for the distributive share of the alleged widow of decedent, taking the form of an objection to the account of his administrators wherein it provides for the distribution of the entire personal estate of decedent to his mother and sisters, must be disallowed, the assignee of the alleged widow claiming

* See Note, Vol. IV, p. 187.

under a written instrument purporting to assign and release all her right, title and interest in the estate of decedent by reason of having formerly been his wife.

The testimony of decedent's mother reciting an alleged declaration by decedent during the time he lived with claimant's assignor, and in which the witness testified that he told her that he was not married to claimant's assignor, was clearly competent and highly important both as a part of the *res gestae* and because it involved the matter of pedigree.

An objection to such testimony as incompetent and immaterial was insufficient to raise the question as to the competency of the witness on the ground that a general objection to evidence is not an objection to a witness, and an objection under section 829 of the Code of Civil Procedure must be directed against the witness, stating the particular grounds.

DETERMINATION of the claim of Henry C. Ricketson.

A. S. Hogue, for administrators.

C. H. Signor (P. J. Tierney of counsel) for claimant.

M. William Bray, for next of kin.

W. L. Pattison, for S. S. Kempner and F. J. Lamarche, contingent claimants asking for intervention.

BOIRE, S.—This trial is the result of a claim against the estate for the distributive share of the alleged widow of the deceased and takes the form of an objection to the account wherein it provides for the distribution of the entire personal property to the mother and sisters of the deceased. The claimant is the assignee of the alleged widow and claims under a written assignment purporting to assign and release to him, "All the right, title and interest in the estate, both real and personal," of the deceased, etc., by reason of having formerly been his wife.

The administrators denied the marriage of the deceased with claimant's assignor and also sought to interpose the further ob-

jection to the claim that the assignment was procured by fraud and for an inadequate consideration. The second objection to the claim, the administrators were not permitted to interpose for reasons that will appear hereafter.

The contest consequently resolved itself into a question of a marriage or nonmarriage of the deceased with claimant's assignor. The main facts proven may be summarized as follows:

The claimant proved that the deceased, a wealthy man, who followed the unusual occupation of strike breaker, returned to Plattsburgh, his former home — and from which he had been absent for several years — about August, 1903; that he purchased a home, moved his mother and sisters there and also established in the household the claimant's assignor, whom he introduced as his wife. That part of his household also consisted of a child of tender age, who was known as his child and bore the name of Catherine Farley; that the said child died in 1904 and was buried in the family plot in the cemetery; that the alleged wife was also called upon to sign a deed with the deceased and did so sign under circumstances indicating that the deceased held her out as his wife. There was further evidence offered of some traveling and visiting among relatives, wherein the deceased held out the woman as his wife. The woman, however, left the deceased soon after the death of the baby and never returned to live with him permanently, although she occasionally visited him for several years thereafter, but never at his home. The woman in question married a stranger to these proceedings in 1909, apparently without ever having procured a divorce from the deceased and is now the mother of two children from this union.

She herself was sworn by the administrators and in her evidence recites what in substance she claims to be the truth of her relations with the deceased.

In 1900, while living in Boston, Mass., she being twenty years of age, became engaged to marry the deceased, who at that time

was thought by her to be a motorman on the street cars but was in reality a detective. In September of that year they appeared before the registrar of Boston and filed a notice of intent to marry and received a certificate or license to marry. On the way from the registrar's office the deceased proposed to her that she announce to her parents that they were married and that they live as man and wife. He thereupon went into a jewelry store and bought a wedding ring, came out on the street where she was standing and gave it to her without any words. She acceded to his proposal, thinking, as she said, that the marriage would soon occur. They lived together at her father's home in Boston for a couple of months, then his duties for the next two years took him to Brooklyn, Pennsylvania, Buffalo and New York city, at all of which places she lived with him as his wife for several weeks at a time, spending the greater part of the time, however, at their home in Boston. In August, 1903, she moved with him to Plattsburgh. She bore him a child, which was baptized as their legitimate child, Catherine Farley, who died in 1904.

In the meantime the increased prosperity of the deceased was accompanied by his increased indifference and cruelty towards her and soon after the death of their child in 1904 she left him. She asserts that there never was any ceremony, contract or understanding between them whereby they took each other in marriage. She asserts that she never considered herself his wife, although she hoped that he would make her his wife and that she repeatedly requested him to do so, a request he always replied to by deferring the matter or offering to have the ceremony performed in some place where they were well known, which latter offer was refused by her as certain to reveal to the public the illicit nature of their former cohabitation. She further asserts that she never got any divorce from him and married in 1909 on the assumption that she was single, but publicly declaring that

she was divorced in order to preserve her reputation. The deceased did not maintain her from 1904 until his death and made no settlement with her.

The assignment which brought on the contest grew out of the purchase by Henry C. Ricketson of a piece of real estate that had been recently owned by the deceased and deeded by the latter without the signature of the alleged wife. Ricketson, desiring a quit-claim of the premises from the woman, found her and for a nominal sum obtained not only a quit-claim of the property purchased by him, but an assignment of any rights that would flow to her by reason of having been the wife of the deceased. This interest, if established, would be worth \$17,000. In this transaction she asserted to Ricketson that she had married Farley and was divorced. Her version of this transaction is that she supposed she was merely clearing up the title to the property by quit-claim, etc., and did not believe that she was laying claim to anything against the estate and that her allegations of marriage and divorce were made, not with a view of claiming any part of the estate of the decedent or enabling any one else to do so, but solely for the purpose of protecting her name. She knew that the deceased was, or had been, a wealthy man and consented to sign the assignment for nothing. Claimant alleges that he paid two dollars for it, and she admits two dollars were left with her. She was cited but made no claim.

From these facts we are called upon to decide whether or not there ever was a marriage between the parties. In so doing we are hedged about by various presumptions that arise either from public policy or amount in effect to inferences resulting from proven facts. A well-known presumption requiring no quotation of authority is that people who hold themselves out as husband and wife are presumed to be married, and were the proofs in this case confined to cohabitations and declarations of the parties up to the time of their separation their marriage could be legally accepted as a fact, but a brief survey of the evidence dealing

with the inception of the relations precludes us from extending the presumption of legitimacy to these relations.

No formal carriage was proven and from the circumstances surrounding the case, and the testimony introduced, I am satisfied that no ceremony was ever performed, and the testimony of the alleged wife denying a ceremony of marriage is very strongly supported by such circumstances and the evidence produced as well as the evidence that is lacking.

This union had its inception in Massachusetts. The laws of Massachusetts for over two hundred years have required the "solemnizing" of marriage, which event requires the intervention of a functionary or witnesses acting in a ceremonial capacity and all of them required by law to make a return for the purpose of recording the marriage. The canon law which is incorporated in the English common law has never been accepted in the commonwealth of Massachusetts, so that, although we might be willing to disbelieve the testimony of the woman, the laws of Massachusetts prohibit our clothing the initial period of this union with the mantle of legal charity that the common law usually provides for events of this character and leads inevitably to the conclusion that James Farley, in September, 1900, after filing a notice of intention to marry, took his sweetheart not as a wife but as a mistress. (Massachusetts Public Statutes of 1882, chap. 145, § 22; Massachusetts Public Statutes of 1902, chap. 151, § 30; *Commonwealth v. Munson*, 127 Mass. 459; *Norcross v. Norcross*, 155 id. 425; *Peck v. Peck*, 155 id. 479.)

All of these cases interpret the statutes of Massachusetts and are authority for the conclusion above stated as to the law of Massachusetts on the subject of private marriages, or so-called common-law marriages, being in effect a simple contract, made privately between the parties. The first case cited traces the law back to early colonial times and so states the policy of the commonwealth. The second case cited is very similar to the present one in that the parties had lived for short periods of

time outside the State of Massachusetts and in States recognizing so-called common-law marriages, yet the court refused to uphold the alleged private marriage on any construction of events and refused to presume a marriage in the common-law States. In the last named case the Massachusetts courts refused to uphold an agreement of marriage made in a common-law State, although the agreement was specially proven, because there was a reservation in the marriage agreement that it should last only during the continuance of mutual affection; the reservation being the result of religious convictions of the contracting parties.

We are then called upon to presume a common-law marriage between the parties during a two weeks' stay in Pennsylvania or protracted stays in New York State prior to 1902, the year in which common-law marriages came under the ban of the New York statutes, and we are cited *Gall v. Gall* (114 N. Y. 109), and various cases of the same tenor, all of them being authorities for the legal proposition that a meretricious relation between parties may be assumed to have become legal from circumstances following the termination of the obstacle to a previous marriage or from other circumstances denoting such a change.

All of the cases cited, however, in support of this phase of the case from *Caujolle v. Ferrie* (23 N. Y. 90), to *Matter of Matthews* (153 id. 443), are cases where facts by way of the conduct of the parties or change of circumstances warrant a conclusion that a relationship once illicit has changed in its character either because of the removal of some legal impediment to marriage or the purifying of the bond of affection between the parties. Thus we read that "decent conduct long continued, orderly and apparently matrimonial in its character," etc., may overcome the presumption arising from the illegal origin of the union, and it might be noted here that while I accept the authority of these cases both because of the soundness of the decisions and their exalted legal source, yet, one must bear in mind that many of these cases involved the upholding of a decision or a

verdict on an issue of fact in a lower court and for that reason some of these cases lose something of their force when cited on an original trial for the determination of a question of fact. In my opinion the comparative brevity of the relation between Farley and the woman in question should go a long way to convince me that the outer demonstrations of their union should not be construed as matrimonial and this, together with the fact that the continuance of the relations between the parties, far from affording grounds for believing the relationship matrimonial, would naturally lead us to the other conclusion, since time only produced more discord and dissension between them, which finally culminated in its termination in 1904, less than four years from its inception. Their relationship thereafter consisted of occasional meetings away from their home; and these could scarcely be called matrimonial in character, and even these semi-clandestine meetings terminated in 1907 without death or divorce intervening to sever them.

There is no proof of support by the alleged husband from 1904 on or of any legal proceeding by way of divorce or non-support on the part of the estranged woman, although it is fairly certain that she consulted an attorney on the general subject of her relationship with the deceased. She knew he was a wealthy man and it would seem as though something of the above nature would have developed from these considerations had the parties been man and wife. Such action, had it taken place, could scarcely have avoided the evident scrutiny of the aggressive claimant in this case and that of his adroit attorneys who, from the record, appear to have been on the ground investigating and testing the consistency of the woman's testimony, of the nature of which they were apprised in advance of the trial.

The undisputed evidence, therefore, would seem not to require that we indulge a presumption that the illicit relations were transformed by marriage but rather would sanction the

presumption that a relation illicit in its origin continued such until its termination in discord and separation while the woman was still young and in possession of all her beauty, and while the man was about to achieve the pinnacle of his financial success.

The coincidence is significant and proves that a relationship inspired by folly and inexperience broke down for lack of the support that could be afforded only by the bulwarks that form a part of the matrimonial relation.

There is also another feature of this case that should not escape attention; that feature of the case is this: Law favors both legitimacy of birth and of cohabitation, and all of the cases cited in support of a construction of the facts of this case as matrimonial in character are cases that involved either legitimacy of children or were invoked by the spouse in support of honor and property rights. These cases are, therefore, clearly distinguishable from the present one on both of these grounds. Moreover, the reasons underlying the presumption invoked by the claimant in this case are the very ones public policy indicates should sustain a presumption against the claimant. Legitimacy is not so much for individual advantage as for the public good. In the case under consideration there is no surviving issue, one party is dead, the other is remarried without divorce and is the mother of two children. Public policy, which controls the presumption in doubtful cases would seem to lend its sanction to the support of the present marriage, as the law is forward looking and progressive rather than reminiscently sentimental.

I have reviewed the law applicable to this case on the assumption that the evidence was evenly balanced, but as a matter of fact there was a heavy preponderance of evidence against the claimant and only a portion of the administrators' proofs is set forth in the foregoing.

The claimant has shown much ingenuity in marshalling the

evidence of the case in his brief and we are asked to entirely disbelieve the claimant's assignor, the original source of this claim, and to conclude that she was an experienced woman, well versed in the law, for the purpose of making her assignment to claimant but to presume that she was ignorant of the law on the question of the legal requirements of a marriage and the necessity of a divorce for a remarriage, and that she is likewise ignorant of the criminal responsibility for bigamy or the legal status of her offspring. I think that if any presumption can be indulged on the question of her marriage in 1909, both the facts in the case and the general presumption of law favored a presumption that the woman contracted a legitimate marriage rather than the presumption that she committed a crime, to-wit, bigamy. (*Matter of Matthews, supra.*)

Claimant also advances the argument that claimant's assignor dare not testify that she was married to the deceased because she would thereby make herself out a bigamist and would have to face that awkward situation in her domestic affairs, and this same reason is ascribed to her willingness to part with for nothing property rights worth several thousand dollars. This argument could be answered by a reiteration of the above, and the further argument that in order to accept this hypothesis we have to presume the existence of the disputed marriage; hence, this argument is of no value once we have decided that there was no marriage, or, rather, that the claimant has not shown a marriage.

In his brief the claimant expresses the opinion previously expressed by him in summing up, that the testimony of the decedent's mother reciting an alleged declaration by the decedent during the time he lived with the woman in question and in which the witness testified that the deceased told the witness, his mother, that he was not married to this woman, is incompetent and should not have been admitted. The testimony is clearly competent and highly important both as a part of the

res gestæ and secondly because it involves a matter of pedigree. (Badger v. Badger, 88 N. Y. 546; Eisenlord v. Clum, 126 id. 552; People v. Miller, 30 Misc. Rep. 355.)

Claimant intimates that it is forbidden by section 829 of the Code of Civil Procedure relating to testimony regarding transactions with deceased persons. To this objection the answer is that the objection made to the testimony was that "It is incompetent and immaterial." The objection was insufficient to raise the question of the competency of the witness, being as it was addressed to the competency of the testimony. A general objection to evidence is not an objection to a witness, and an objection under the section quoted must be directed against the witness and stating the particular grounds. (Hickok v. Bunting, 67 App. Div. 560; Russell v. Hitchcock, 105 id. 315; Morgan v. Foran, 120 id. 185.)

Having arrived at the conclusion that there was no marriage between the deceased and the claimant's assignor, the decision makes it unnecessary to decide the question of the validity or invalidity of that assignment, since the assignment carried nothing with it of concern to the administrators, but in view of the novelty of the question, arising as it does soon after an amendment to the law relative to the powers of the surrogate whereby surrogates are given a broadened jurisdiction under section 2510 of the Code of Civil Procedure, and in view further of the fact that the issue was raised by an administrator whose duties partake of the nature of a trust, it may not be barren speculation to dwell on the question of the authority of the administrators to interpose to the claim the defense that this assignment to the claimant was illegal because of fraud and inadequacy of consideration. The administrators were not permitted to interpose this defense, but in their brief they ask its consideration, inasmuch as by mutual consent and by the necessary examination of the assignor on her motives and credibility

practically the complete transaction relative to the assignment has found its way into the record.

There is little doubt that, even previous to the recent amendment enlarging the scope of the surrogates' jurisdiction, this court had the power to decide the validity of marriage as well as the validity of assignments of legacy or of distributive share. (*Matter of Thornburgh*, 72 Misc. Rep. 619; *Matter of Dollard*, 74 id. 312.)

Matter of Grant (37 Misc. Rep. 151), cited by claimant, is obsolete, as it was decided before the amendment of 1910, known as section 2472a of the Code of Civil Procedure, and likewise previous to the amendment of 1914, further enlarging the surrogates' powers by section 2510.

This power of the surrogate is exercised only when the question is raised by the party concerned, and while surrogates are given a wide range of power to decide "Questions legal or equitable arising between any or all parties to any proceeding," etc., there is nothing in the section to indicate so wide a departure from the ordinary principles of jurisprudence as to read into that section the authority of the surrogate to decide and the right of an administrator to raise questions that have never otherwise arisen and that concern neither the court nor the administrators, since one is not in privity with the person whose rights have been invaded and the other has no prerogative authorizing the determination of a purely personal right when that right is not asserted by the only person concerned. It is a well settled rule of law that when a court is awarded general equitable jurisdiction it takes its authority subject to the limitations and precedents that accompany the same power in other courts exercising the same. Therefore, the authorities of the Supreme Court are binding on this phase of the case. These authorities satisfy me that the administrators could not interpose the objection of fraud and inadequacy of consideration,

and consequently that the surrogate could not determine that issue.

It is well settled that an obligor's duty is to pay the one who holds the legal title to the obligation. He has no business to inquire into the adequacy of the consideration of an assignment; he has no duty to inquire into the good faith of the assignment; he only can insist that the holder of the obligation has the legal title, and, except in cases of equitable assignment, he is protected and can only insist that he will be protected in making the payment. (*Matter of Pruyn*, 141 N. Y. 544; *Matter of Wagner*, 119 id. 28.)

While the administrator's office has the characteristics of trust, once he has collected the assets, paid the debts and is ready to account, he has no greater duty to the next of kin than a debtor owes to the owner of a debt; to wit, to pay. The office of an administrator is not paternal to the extent of taking up cudgels for beneficiaries who make no claim or contest and who by their silence ratify the assignment of their interest. The administrators cited claimant's assigner. She made no contest and specifically stated that she wanted nothing out of the estate. The administrators' duties were complete when they brought her in, and as between paying her or her assignee they can only be guided by the ordinary principles applying to debtors and trustees alike.

It is argued that the administrators represented the next of kin, which may be true, but it is equally true that they do not represent the next of kin in the private affairs of the latter, such as sale of their interests in property of any kind. Only the assignor or persons claiming under her could attack the assignment for fraud or inadequacy of consideration. The assignment was valid on its face, the assignor did not appear or attempt to appear in accordance with the ordinary rules for doing so, and the administrators are mere volunteers when they attempt to attack the assignment. (*Sheridan v. Mayor*, 68 N.

Y. 30; *Allen v. Brown*, 44 id. 228; *Graser v. Stellwagen*, 25 id. 315; *Guy v. Craighead*, 6 App. Div. 463.)

The administrators have sought to raise these identical issues by saying that the assignee was not a party to the proceedings. That is only another way to attack the assignment and is met by the same arguments that answer the direct attack on the assignment. Any person is properly a party who holds an assignment valid on its face, sufficient as the ordinary assignment, both under the common law and all statutes bearing on the subject, and properly authenticated and recorded. Under those circumstances, no assignment could be void so as to preclude the appearance of the party claiming under it.

Decreed accordingly.

Matter of the Transfer Tax Upon the Estate of JOEL NEWMAN,
Deceased.

(*Surrogate's Court, Bronx County, June, 1915.*)

**TAXES—TRANSFER TAX—ARRIVING AT VALUE OF UNLISTED STOCK FOR
TRANSFER TAX PURPOSES—EVIDENCE.**

In arriving at the value of an unlisted stock for transfer tax purposes, direct evidence of sales at or about the time of death will outweigh an unverified report of an investors' agency based upon offers claimed to have been made by various unnamed brokers, and upon quotations in a financial publication, nothing being shown as to the weight to be given such publication.

APPEAL from order fixing transfer tax.

Ira Bliss Stewart, for executors, appellants.

John Boyle, Jr., for comptroller, respondent.

SCHULZ, S.—At the time of the death of the testator, which occurred on the 5th day of May, 1914, there were due to him certain debts more particularly set forth in the report of the appraiser, as to which the latter suspended appraisal. The decedent also owned 384 shares of stock of a corporation having a part value of \$100 each, which the appraiser valued for purposes of taxation at \$300 each.

The executors appeal from the order of the surrogate entered upon the report of the appraiser, and the grounds of the said appeal are stated to be that the appraiser erred (1) in failing to find that the claims referred to were without value, and (2) in valuing the shares of stock aforesaid at \$300 each instead of at their real value, which they claim did not exceed \$250 per share. Upon the argument of the appeal, the first ground stated was not insisted upon and is not now urged, so that there remains only the question whether the appraisal of the stock at \$300 per share is correct. No witnesses were examined by the appraiser, the proof being taken in the form of affidavits. Upon behalf of the executors there were submitted to the appraiser affidavits of the manager of the New York store of the corporation. These affidavits set forth that the affiant has been connected with the corporation in an executive capacity since its incorporation, many years ago; that the stock was not listed; that at the date of death of the testator, May 5, 1914, the book value thereof was \$130 per share; that the book value thereof in February, 1915, was \$150; that for several years last past the company has paid annual dividends of ten per cent and two and one-half per cent; that deponent knew of a sale of 100 shares of stock made prior to February 10, 1915, and, near that date, at \$275 per share, and that he, as one of the executors of the will of the decedent, about the tenth day of February, sold thirty-four shares of stock to one person and fifty shares to another at \$275 a share; that most of the sales of stock were to employees of the company in small lots, said sales being made

to increase the interest of the buyers in the success of the corporation, and he gave as his opinion that a fair and reasonable valuation of the said stock at the date of the death of the decedent was \$250. As against this affidavit nothing appears to have been before the appraiser, except a report not under oath, which did not deny any of the facts stated in the affidavit submitted on behalf of the executors and which should not have been received. (Matter of Chambers, N. Y. L. J., January 31, 1912.) This report was made by "The Investors' Agency," and among other things set forth that certain quotations therein more specifically set forth had been reported in a financial publication at Chicago. Nothing was before the appraiser to show what weight should be given to the reports in the publication mentioned. There was also a statement in this report that certain offers were made by "various brokers of New York, Chicago, etc.," offering shares of stock in lots varying from five to fifty shares at prices therein set forth and which varied from 270 to 318 between April 29, 1914, and January 13, 1915, and the writer of the report states that in his opinion the shares can be fairly appraised as of May 5, 1914, at \$300 per share. There is no actual sale set forth in the said report.

Upon these documents the appraiser found that the value of the shares was \$300 per share. In my opinion, this finding upon the papers before him was not justified. I do not consider the unverified report of any weight as against the affidavit submitted on behalf of the executors. But, even if the report had been verified, I would still hesitate under the authorities to place a valuation of \$300 upon the stock of this corporation with the facts set forth in the affidavits of its manager before me and undisputed.

That the transfer of these shares of stock is taxable as of the date of death is not open to discussion. The sales referred to in the affidavits of the executors were made some time after the death of the decedent, and it is urged that the value of the shares

of stock at the time of death was less than the sale price. No reason is stated in the affidavit, however, why they were of less value at the time of the death of the decedent than they were at the time of the sale, except that the book value was less. Upon the evidence before the appraiser, I am of the opinion that the value of the said shares of stock at the date of the death of the testator was the same as when the sales referred to in the affidavits were made. It follows that the shares of stock should have been assessed at \$275 each. The order will therefore be reversed and the appraiser's report remitted to him for correction, as indicated.

Order reversed and appraiser's report remitted for correction.

Matter of the Transfer Tax Upon the Estate of MARIA A.
VALENTINE, Deceased.

(*Surrogate's Court, Bronx County, June, 1915.*)

**TRUSTS—TRANSFER TO TRUSTEES OF ALL REAL AND PERSONAL PROPERTY—
PROVISIONS—WILLS—FIXING TAX UNDER LAW AS IT EXISTED AT DEATH OF
SETTLOR.**

A decedent by instruments executed and delivered before her death conveyed and transferred to trustees all her real and personal property, upon a trust to apply the income to the use of the grantor or settlor during her life, and, if necessary in the opinion of the trustees, to similarly apply the principal of the personalty or the proceeds of the sale of real estate, and upon the death of the settlor to sell the remaining real estate and convert it into cash, to be deemed personalty, and to pay the same together with the cash resulting from the sale of the remaining personal property to such persons and in such proportions as might be provided by the settlor in her last will and testament or else as provided by the laws of the State of New York in force at the time of the settlor's death for the distribution of estates in case of intestacy. The trust further provided that if, upon the death intestate of the settlor, it appeared to the satisfaction of the trustees that the share of any legatee or next of kin was subject to seizure or interference by judgment, claim or

execution against such next of kin, such share should be held in trust by the trustees and the income, and such part of the principal as the trustees might deem necessary be applied to the support of said next of kin until the exhaustion of the fund or the disappearance of the danger of seizure, in which latter event the balance of such share was to be paid to the next of kin or, if he had in the meantime died, to his issue *per stirpes* and not *per capita*. The settlor having died intestate,

Held, that, as to those of the next of kin whose shares were not subject to seizure, the tax must be fixed under the law as it existed at the time of the death of the settlor, they taking under the statute and not under the trust instrument, and that as to those of the next of kin whose shares were subject to seizure the tax should be fixed under the law as it existed on the date when the trust instruments were executed.

APPEAL from order fixing transfer tax.

Abel Crook, for trustees, appellants.

Salter & Steinkamp, for G. A. Briggs, appellant.

Tulin, Dunham & Sisson, for Mabel W. Cable et al., appellants.

John Boyle, Jr., for comptroller, respondent.

SCHULZ, S.—Maria A. Valentine died April 2, 1913. On the 7th day of January, 1909, she executed and delivered an instrument granting, conveying, assigning, releasing, transferring and setting over unto two persons therein named all of her property, real and personal, and on the same day she executed a deed of all her real property to the same persons; both instruments being upon the trusts hereinafter stated. The transfer tax appraiser, in appraising her property, did so under the law relating to taxable transfers of property as it existed on the 7th day of January, 1909, the date of the documents above referred to.

The trustees have appealed from the appraisal and from the

order which was entered thereon assessing the tax. The appellants claim that the appraiser erred in fixing the value of certain property owned by the decedent, consisting of a parcel of real estate in the county of Bronx, city of New York, and in assessing the tax under the law as it existed at the time of the execution and delivery of the instrument aforesaid; their claim being that the said tax should have been assessed under the laws in force on the date of the decedent's death.

The appraiser heard testimony submitted on behalf of the State Comptroller and on behalf of the appellants as to the value of the parcel of real estate above mentioned. The assessed valuation of this property for purposes of taxation was \$58,000. The testimony on behalf of the appellants was that it was worth \$61,000, and that on behalf of the Comptroller was that its value was \$70,600. The appraiser found it to be worth \$68,000. I do not feel that I would be justified upon the testimony in this proceeding in concluding that his appraisal was not fair, and I accordingly sustain his valuation of the said real property. (Matter of Valentine, 163 App. Div. 843.)

In considering the second question raised on the appeal, it becomes necessary to examine the trust instruments executed by the decedent on the 7th day of January, 1909. As the deed heretofore referred to embraces only real property and contains provisions substantially the same as the other trust instrument, and as the latter refers to all of the property, both real and personal, unnecessary duplication will be avoided by considering only the trust instrument last mentioned. That part of the document in question which contains the trust provision, so far as material, is as follows: "To have and to hold the above granted premises * * *. In trust nevertheless to collect the income from such real and personal property * * * and to apply the net income derived therefrom to the use of the party of the first part (the settlor) during the term of her life,

and if in the opinion of the parties of the second part (the trustees), their survivor, successor or successors, such income shall be insufficient for the proper maintenance of the party of the first part, then the parties of the second part, their survivor * * * shall be at liberty to apply any portion of the principal of the personalty or the proceeds of any sale of the real estate to such purpose without liability * * *."

As to the disposition which shall be made after the death of the decedent, the document provides that "upon the death of the party of the first part, the parties of the second part, * * * shall sell * * * my said real estate or so much thereof as shall not have been theretofore sold and convert the same into cash, to be deemed personalty and pay over the same to such persons and in such proportions as shall be provided in my last will and testament or otherwise as shall be provided by the laws of the State of New York in force at the time of my death for the distribution of estates in case of intestacy. And shall also sell * * * all my personal property and add the net proceeds arising from said sales to the balance of the moneys in bank to be distributed as above provided relative to the proceeds of real estate. * * * If upon the death intestate of the party of the first part it shall appear to the satisfaction of the parties of the second part, their survivor * * * that the share then to be set apart and which would be distributable to any of my legatees or next of kin shall be in danger of being levied upon, seized * * * or otherwise interfered with under any judgment, claim, execution * * * then such shares shall be held by the parties of the second part * * * in trust and deposited or invested at interest in such banks * * * as to the parties of the second part * * * may seem best and the income arising therefrom, together with such portion of the principal * * * as the parties of the second part * * * may deem necessary * * * for the maintenance and support of said beneficiary shall be applied to

the use of such beneficiary during his or her life or until such share becomes exhausted or until it shall appear * * * that such danger has been removed and thereupon the principal of such share shall be paid to said legatee or next of kin entitled thereto. Any portion of his or her share not paid during the life of such legatee or next of kin upon his or her death shall belong to his or her issue *per stirpes* and not *per capita*."

The appellants contend that Matter of Hawes (162 App. Div. 173), is controlling on this appeal. In that matter a trust deed similar in many respects to the one under consideration was before the court. It provided that at the death of the settlor, if he died without making a contrary direction in his will, the trustees were to pay, distribute and convey what then remained of the trust property according to the statute regulating the descent and distribution of intestate estates. Under this language the court stated that the most that could be claimed for the deed of trust was that it designated by description as the person to whom the property was to be paid over the same person who would have taken it under the Statute of Distributions if no designation had been made in the deed of trust, and the decedent had died intestate, and that in such case the next of kin must be held to take under the Statute of Distributions and not under the deed of trust or the apportionment contained therein; and it was upon that view of the matter that the court decided that the tax should be assessed and fixed under the law as it existed at the time of the death of the settlor and not at the date of the trust instrument.

In the document now under consideration, however, it will be noted that after providing for the distribution of her property in case she left no will to the persons and in the shares provided by law for distribution in case of intestacy, the settlor added a trust provision with reference to the shares of such of the next of kin as might be in danger of seizure. Hence the distribution is the same as that which would take place under the stat-

ute, except as to those shares, if any, which might be in danger of seizure. If, therefore, the reasoning in *Matter of Hawes* be followed, namely, that preference is given to distribution under the statute, the beneficiaries who take in the same way as they would have taken under the statute must be held to take under the statute, unless the fact that the decedent added a provision with reference to the shares of beneficiaries which were liable to seizure prevents the application of the principle enunciated in *Matter of Hawes*.

In *Matter of Chapman* (133 App. Div. 337), (appeal dismissed, 196 N. Y. 561, no opinion), the facts were as follows: One John Davol died in 1878 leaving a last will and testament dated November 21, 1874. By this will he gave to his trustees a share of his estate in trust for the benefit of his daughter, Maria B. Chapman, during her life, and provided that at her death the trustees were to pay over the same to such person or persons as said daughter should by her last will and testament direct. In default of an exercise of the power of disposition given her, the trustees were to pay the same to the lawful issue of such daughter in the same manner as if such daughter had died intestate owning the same. The daughter, by her last will and testament and a codicil thereto, gave and devised this share of her father's estate to her sons in the same shares that they would have received under the will of their grandfather, if their mother had died intestate. She added a provision, however, that one of these shares should be held in trust for each of her sons until they attained the age of twenty-five years. All of her sons were more than twenty-five years of age at the time she died. The question was whether the sons took under their grandfather's will or their mother's will. The court held that notwithstanding the fact that she had made a disposition of her property which would have been different from that made by the will of her father if her sons had been under the age of twenty-five years, the fact that they were over the age of twenty-

five years at the time of her death made this disposition the same as that which had been made by her father's will.

Applying this reasoning to the case under consideration, it would follow that notwithstanding the fact that provisions are made for possible trusts, if the circumstances authorizing the same did not exist at the time of the death of the decedent, the beneficiaries as to whose shares they did not exist take in the same way as they would have taken in case of intestacy. In this event the decision in *Matter of Hawes*, in my opinion, applies, and is controlling.

I accordingly hold that, as to the shares which the trustees have paid or will pay over direct to the beneficiaries as provided by the trust instrument, the tax must be fixed under the law as it existed at the time of the death of the settlor.

We come then to a consideration of the shares of those beneficiaries, if any, which are liable to seizure. The tax in question is not a property tax but a tax upon a particular method of acquiring property. (*Matter of Vanderbilt*, 172 N. Y. 69; *Matter of Keeney*, 194 id. 281; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283.) It is a tax or charge upon the transfer of property, *Matter of Ramsdill* (190 N. Y. 492); *Matter of Dows* (167 id. 227, 231); *Matter of Gihon* (169 id. 443); *Matter of White* (208 id. 64), and by the transfer of property is not meant necessarily the physical transfer, but the right to receive the property even though its actual possession and enjoyment may be postponed. (*Matter of Webber*, 151 App. Div. 539.)

The decedent by the language employed in the document designated her next of kin as the objects of her bounty. It is true that at the date of execution of the same the persons who would be in that class were uncertain for the reason that the settlor had provided that the laws in force at the date of her death should govern in their determination, and this would have been so even if there had been no provision to that effect

for a living person can have no next of kin. (*Whittemore v. Equitable Trust Co.*, 162 App. Div. 607; *Robinson v. New York Life Ins. & Trust Co.*, 75 Misc. Rep. 361.) The amount transferred was also uncertain because the decedent might use not only the income, but also the principal of the trust fund under certain conditions. The latter contingency, however, is provided for by the statute, section 222 of the Tax Law, as far as material, being as follows: “* * * Taxes upon the transfer of any * * * property * * * limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer * * * shall accrue and become due and payable when the persons * * * beneficially entitled thereto shall come into actual possession or enjoyment thereof.” As the settlor reserved to herself a possible use of the principal, the fair market value of the property which was transferred cannot be fixed until the death of the settlor, and, as such a condition is recognized and provided for in the law, it must follow that its existence in any given case does not interfere with the transfer which, under the statute, is taxable; the market value being ascertained at the time of the death of the settlor and the rate of taxation being governed by the provisions of the statute in force at the time of the transfer. (*Matter of Granfield*, 79 Misc. Rep. 374.)

There then remains only the uncertainty as to the beneficiaries with reference to the shares now under discussion, and if, as contended, this uncertainty prevents the transfer until the death of the decedent, the conclusion which I arrive at as to such shares is wrong. I do not believe, however, that this is the case. The purpose of the direction to pay to the persons who would be entitled to take in case of intestacy was a direction to pay to a class and was sufficient to carry the grant. (*Matter of Mayo*, 76 Misc. Rep. 416.) The death of the settlor fixed

the time when the next of kin were to take, but it did not create their right to take in the manner provided for by the trust instrument. The latter fixed three things definitely, (a) that the persons who would take should belong to a certain class; (b) the proportionate share each would receive, and (c) the manner in which he or she would receive it.

The rights, therefore, which accrue to the persons whose shares would be liable to seizure came to them through and by virtue of the provisions of the trust instrument when the same was executed and delivered by the settlor to the trustees. The laws in effect when the right of succession became fixed govern. When the beneficiaries actually come into possession of the property is of no consequence. (Matter of Webber, 151 App. Div. 539, citing Matter of Swift, 137 N. Y. 77, 88; Matter of Haight, 152 App. Div. 228.)

I therefore conclude that as to the shares liable to seizure, etc., the tax should be fixed under the law as it existed on the date when the trust instrument was executed.

What shares, if any, are liable to seizure is a question of fact. There appears in the record no evidence upon which I can base a finding in that regard, and before the tax on the various shares can be fixed a solution of that question is necessary.

I accordingly reverse the order heretofore entered and remit the matter to the appraiser to take testimony upon the question indicated and report in accordance with this opinion.

Decreed accordingly.

Matter of the Estate of PHEBE PEARSALL, Deceased.

(*Surrogate's Court, New York County, June, 1915.*)

WILLS—GIFT TO INDIVIDUALS NOT TO A CLASS—WHEN REMAINDER INTERESTS VESTED—PAROL EVIDENCE INADMISSIBLE TO EXPLAIN WILL.

Where the will of testatrix gave to her executors the sum of \$30,000 in trust, the income thereof to be applied to the use and benefit of her nephew, Nathaniel Coles Pearsall, during his life, and at his death gave the sum of \$30,000 to Thomas Pearsall and Helen Pearsall, children of James B. Pearsall, share and share alike, held that the legatees took as tenants in common, the gift being to them *nominatum* and the use of the words "children of James B. Pearsall" being merely descriptive.

Further, *held*, that the remainder interests of Thomas and Helen Pearsall were vested.

Parol evidence as to declarations of testatrix held inadmissible, where the words and language of the will are not ambiguous, or have a fixed and settled construction.

PROCEEDINGS for the construction of the will of the testatrix.

Winston H. Hagen, for petitioner and trustee.

Lannon & Bailey, for administratrices of Thomas B. Pearsall.

Cravath & Henderson, for respondents Augustus B. Field and Thomas P. Field, individually and as trustees for Maunsell B. Field and Mary Field Payne.

COHALAN, S.—Upon this accounting the will of the above named testatrix is before the court for construction. By the tenth paragraph thereof the testatrix provided as follows:

"X. I give and bequeath to my executor or executors the sum of thirty thousand dollars in trust, the income thereof to be applied to the sole use and benefit of my nephew, Nathaniel

Coles Pearsall, during his life, and at his death I give and bequeath the said sum of thirty thousand dollars to Thomas Pearsall and Helen Pearsall, children of James B. Pearsall, share and share alike. In case the said Nathaniel Coles Pearsall shall not survive me, I give and bequeath the said sum of thirty thousand dollars to the said Thomas Pearsall and Helen Pearsall, share and share alike."

The testatrix died July 9, 1895. The life tenant, Nathaniel Coles Pearsall, survived the testatrix and died April 24, 1913. Helen Pearsall, one of the remaindermen mentioned in the above quoted paragraph, predeceased the testatrix, having died on the 8th day of October, 1887, unmarried and without issue. Thomas Pearsall, the other remainderman, survived the testatrix, but predeceased the life tenant, having died on October 26, 1897. He left him surviving a widow, Cora B. Pearsall, and an only child, Phebe Pearsall, a great grandniece of the testatrix, both of whom are now living and are administratrices of the goods, chattels and credits of the said Thomas Pearsall, deceased. They constitute one side in this proceeding. The residuary clause in the will named the testatrix's sister, Mary Bradhurst, as her residuary legatee, and in case of her predecease then the testatrix's niece, Frances P. Field. Mary Bradhurst died shortly after the date of the execution of the will, and the testatrix executed a codicil bequeathing the residue in trust to Frances P. Field for life, and at her death to her issue then surviving her *per stirpes* and not *per capita*. Frances P. Field died July 21, 1907, leaving as her sole issue then surviving her children, August B. Field, Thos. P. Field, Maunsell B. Field and Mary F. Payne, and one grandson, Edward P. Field, the son of a deceased child. Maunsell B. Field, by deed of trust, dated December 30, 1903, transferred his interest in the estate of the testatrix to trustees to apply the net income to his use, and at his death to transfer the principal to his testamentary appointees. August B. Field and Thomas P.

Field are the sole acting trustees under said deed of trust. These aforesaid residuary legatees represent the other side of this proceeding.

The administratrices of the estate of Thomas Pearsall claim that upon the death of the life tenant they became entitled to the whole fund which, upon the death of the testatrix, had vested in their intestate, Thomas Pearsall, as the survivor of the *class* described in the will as "children of James B. Pearsall." The residuary legatees contend that there is no gift by paragraph 10 of the will of the remainder to a class, but that the gift was to Helen and Thomas individually, as tenants in common, and that by their having predeceased the testatrix and the life tenant, respectively, the shares which they would have received if they had survived have lapsed and fallen into the residue.

The contention of the administratrices that the legacy of the remainder contained in paragraph 10 is a legacy to a class is based upon the use of the phrase "children of James B. Pearsall" as being antagonistic to a gift to Thomas and Helen individually; but this does not appear to be so. Throughout the whole will the testatrix describes her beneficiaries by relationship, in addition to the recital of their names, as "my sister, Mary Bradhurst," "my niece, Frances Pearsall Coles," "my nephew, James B. Pearsall," etc., for the purpose of more particular identification. The phrase "children of James B. Pearsall" is merely descriptive. The gift is to them *nomina-tum*, "share and share alike," and this language has a settled judicial construction as creating a tenancy in common and not a gift to a class. (Moffett v. Elmendorf, 152 N. Y. 475; Savage v. Burnham, 17 id. 561; Matter of King, 201 id. 189; Matter of Kimberly, 150 id. 90.) Furthermore, as against the proposition that the testator intended by paragraph 10 to create a gift to a class, with the consequent right of survivorship, the will in two instances discloses that the testatrix was aware of

the possibility that one or more of a group of legatees might predecease the effective date of the gifts, and where she intended the bequests to go ultimately to the survivors, so indicated and thereby provided against any consequent lapse by directing that the share they would have taken had they survived should go to "their respective lawful issue" (paragraph 11 of the will), or "shall go to the survivors of them, share and share alike" (paragraph 17 of the will), and expressly included in the residue of her estate "all devises and bequests in said will and this codicil which may have lapsed" (paragraph 7 of the codicil).

The case of *Hoppock v. Tucker* (59 N. Y. 202), relied upon by the administratrices to show a gift to a class, is not in point, the decision in that case being based not upon mere language, which, if taken alone, would be construed as a *bequest to the persons named*, but upon the intent of the maker of the will, as gathered from the general scheme of the whole will. In that case there was a uniformity of distribution. The testator divided his residuary estate into, substantially, six parts, corresponding to the number of his children, and the court held that it was apparent that the testator intended to divide his entire estate amongst his children or the issue of any deceased children *per stirpes*, and that there was an intent to create a gift to a class, gathered from all the circumstances of the will. Is it so with the will now before me for interpretation? I think not.

The testatrix had no children, being unmarried, and the will provides for bequests to relatives and certain charities. It is not based upon any impartial or uniform scheme of distribution. On the contrary, the bequests are of varying amounts and arbitrary in character. There is no connection or proportion between the amounts of the bequests and the "roots" or stocks of her family, for by paragraphs 12 and 13 of the will she gave James C. Norton and Harry Norton, grandsons of her sister,

Clara P. Norton, \$55,000, she gave Frances P. Coles, Nathaniel Coles Pearsall and James B. Pearsall, the children of Thomas Pearsall, her brother, together with Helen and Thomas, the children of Thomas B. Pearsall, \$150,000. By paragraph 7 she gave Frances P. Field, her niece, the bulk of her fortune, amounting to several hundred thousand dollars, and gave her sisters and brothers \$20,000 apiece. I, therefore, hold that the legacies to Thomas and Helen Pearsall of the remainder interest, contained in the tenth paragraph of the will, are legacies to them individually as tenants in common, and that the words "children of James B. Pearsall" are merely descriptive. It is well settled that at common law a legacy does not vest in the legatee until the death of the testator, and should the legatee predecease the testator the legacy lapses and becomes part of the residuary. (*Savage v. Burnham*, 17 N. Y. 561; *Matter of Kimberly*, 150 id. 90; *Moffett v. Elmendorf*, 152 id. 475.) Helen Thompson does not come within the exception created by statute (*Decedent Estate Law*, § 29, as amd. by *Laws of 1912*, chap. 384), saving from extinguishment a legacy bequeathed to a child or other descendant of a testator, or a brother or sister of a testator dying during the lifetime of the latter, leaving a child or other descendant who shall survive such testator, and by her death prior to that of the testatrix her legacy lapsed and became part of the residuary.

The next question to be determined is whether the remaining interest of Thomas is vested or contingent. As to that, I hold his interest vested. The use of the words "*at his death*," referring to the life tenant, did not postpone the vesting of the remainder, but simply its enjoyment in possession. It has been repeatedly held that adverbs of time, such as "when, then, after, from and after," in the gift of a remainder limited upon a life estate, are to be construed as indicative of the time of enjoyment and not the vesting of the estate. (*Connolly v. O'Brien*, 166 N. Y. 406. See, also, *Hershee v. Simpson*, 54

N. Y. 496, *from and after her decease*; *Livingston v. Green*, 52 id. 118, *from and after the decease and death of*; *Wooster v. Sage*, 67 id. 63, *from and immediately after her decease*; *Matter of Young*, 145 id. 535; *Estate of Tapley*, N. Y. L. J., Dec. 29, 1914.) The words "at his death" (referring to the life tenant) used in this will before me are not as strong an indication of the creation of a remainder estate to vest only upon the death of the life tenant as the words "from and after the decease and death of," construed by the cases *supra*. It, therefore, follows that Thomas Pearsall upon the death of the testatrix took a vested remainder in one moiety of the trust fund, and that upon his death his interest passed to the representatives of his estate.

It was claimed by the administratrices that paragraph 10 of the will is equivocal and ambiguous and that extrinsic evidence would be admissible to ascertain the intent of the testatrix. Upon the trial of this proceeding parol evidence as to the intention of the testatrix was given. A motion to strike out this testimony was made and the decision thereon reserved. The motion to strike out the testimony as to the declarations of intention of the testatrix is now granted. Testimony as to declarations of a testator are inadmissible except to explain a latent ambiguity or rebut a resulting trust. (*Reynolds v. Robinson*, 82 N. Y. 103; *Williams v. Freeman*, 83 id. 561.) Courts cannot make a new will by the admission of extrinsic parol evidence of declarations, nor prove possible motive where the words and language of the will are not ambiguous or, at any rate, have a fixed and settled construction. Technical legal phrases, the meaning of which has been settled by judicial construction, are deemed to be clear and unambiguous. (*Matter of Wells*, 113 N. Y. 396; *Kerr v. Bryon*, 32 Hun, 51; *affd.*, 102 N. Y. 665.) The intention of the testatrix must be ascertained from the language and context of the will itself, and evidence *dehors* the instrument to explain or contradict it is

inadmissible. (Williams v. Freeman, *supra*; Kelly v. Kelly, 61 N. Y. 51; Van Nostrand v. Moore, 52 id. 18.) And where the language itself is perhaps ambiguous, but by reason of its being the subject of frequent construction and interpretation by the courts it has come to have a fixed and definite meaning, it must be interpreted in the light of the decisions. It is not uncertain or doubtful (Kerr v. Bryan, *supra*), and parol evidence to explain it is unnecessary. The rule that where a will directs an aggregate fund to be divided among individuals by *name, share and share alike*, with an additional description as to relationship, but with no words *necessarily* pointing to a class, they take as tenants in common seems to be well settled. (Savage v. Burnham, 17 N. Y. 561; Marsh v. Consumers' Park Brew. Co., 162 App. Div. 256; Moffett v. Elmendorf, 82 Hun, 470; *affd.*, 152 N. Y. 475.

Decreed accordingly.

DISTRICT NURSING ASSOCIATION OF BUFFALO, Plaintiff, v.
HAZEL M. KOERNER, Defendant.

(*Supreme Court, Erie Special Term, July, 1915.*)

TRUSTS—AGREEMENT TO PAY SALARY—ASSOCIATIONS—WHEN TRUST INVALID FOR INDEFINITENESS.

Testatrix left all her property to her brother, defendant's intestate, "after carrying out any requests I may make to him in my lifetime as to the disposition of my estate for charitable objects." The brother by letter agreed with plaintiff, a nursing association, to pay the salary of a third nurse so long as the association should support the other two, stating that said salary would be paid out of the funds left by his sister for that purpose, and such payment was made until shortly before his death.

Held, that as there was no specific fund to which a trust could attach and no definite proof that defendant's intestate became possessed of any property left by testatrix and the claimed trust was invalid for indefiniteness, a finding of a trust *ex maleficio* was not warranted.

ACTION for the construction of a will.

Lewis & Montgomery, for plaintiff.

Rebadow, Lado & Brown, for defendant.

TAYLOR, J.—For many years prior to her death in 1892 Elizabeth C. Marshall of this city took an active interest in assisting various charities in the city of Buffalo, particularly the free nursing charity enterprise carried on by this plaintiff. Largely through her efforts the said enterprise was incorporated in 1891. In 1888 Miss Marshall made a will in which she substantially left all her property to her brother, Charles D. Marshall, “after carrying out any requests which I may make to him in my lifetime as to the disposition of my estate for charitable objects.” After the death of Miss Marshall, and in March, 1882, Charles D. Marshall wrote a letter to one of the directors of the plaintiff in which he mentions the fact that his sister (Elizabeth C. Marshall) had “expressed a desire to aid the association in some way after her power to give it her personal care and assistance should have ceased, leaving the method of carrying out her wish to me.” In this letter Mr. Marshall further says that he does not think that this can be done better than supplying the need referred to by said direction of the plaintiff, that is to say, the need of a third nurse; and Mr. Marshall goes on to say that he will therefore pledge himself in his sister’s name to pay fifty dollars a month, the salary of the third nurse, so long as the association shall support the other two. He further goes on to say in this letter that the plaintiff should understand clearly “that this is Lizzie’s bequest and will be paid out of funds left by her for that purpose.” Mr. Marshall went on and paid fifty dollars a month to the plaintiff from this time until his death in 1908, a period of sixteen years. Shortly before his death the payments ceased. Mr. Marshall died intestate and left all his property to his adopted daughter, this defendant. The plaintiff claims that the property of this defendant should be impressed with a

trust in favor of the plaintiff in some manner so that the plaintiff shall receive, so long as it shall exist, as I take it, the sum of fifty dollars a month from the estate left by Elizabeth C. Marshall.

Assuming that the wording of the will of Elizabeth C. Marshall and her connection during her lifetime with the plaintiff and its work, taken with the said letter written to Mrs. Bell by Charles D. Marshall, and the payment by the latter, from 1892 to 1908, of fifty dollars a month to the plaintiff for nurse hire, show a disposition on the part of both Elizabeth C. Marshall and Charles D. Marshall to assist this worthy charity, is there sufficient shown thereby and in addition thereto to warrant my finding a trust *ex maleficio* in favor of the plaintiff, substantially *in perpetuo*? If the answer to that be no, then it seems to me that I cannot find that a lump sum should be turned over to the plaintiff sufficient to give it an annual income of \$600, for in effect that would amount to the same thing practically as the perpetual trust. So what have I before me in addition to the facts above assumed: (1) The leaving by will of property, whose value is not definitely shown, to Charles D. Marshall by Elizabeth C. Marshall. (2) That the defendant as sole heir inherited the property of Charles D. Marshall. There is no specific fund to which the claimed trust attaches. There is no definite proof that this defendant became possessed of any of the property left by Elizabeth C. Marshall. The duration time of the claimed trust is entirely indefinite and therefore such trust is invalid. Even if there were a trust created in Charles D. Marshall, there is nothing to indicate who or how many others should become trustees in turn at the death of Charles D. Marshall. Then too, to render this a valid trust it must have been absolutely confined to two lives in being. As Judge CULLEN says in *Matter of Mount* (185 N. Y. 169), quoting from *Schettler v. Smith* (41 id. 328): "It is not sufficient that the estate attempted to be created may, by

the happening of subsequent events, be terminated within the prescribed period, if such events might so happen that such estates might extend beyond such period. In other words, to render such future estates valid, they must be so limited that in every possible contingency they will absolutely terminate at such period, or such estates will be held void." The rule is that the question of lawful or unlawful suspension of absolute ownership is not to be determined from what actually happens but upon what may happen under the terms of the will at the date of the death of the testator.

I can reach no conclusion other than that Charles D. Marshall was financially generous to the plaintiff for his sister's sake, and perhaps partially through his own inclinations, for sixteen years; that whatever the desires of Elizabeth C. Marshall may have been she failed to create any valid trust in favor of this plaintiff that would have bound even Charles D. Marshall, much less this defendant.

The complaint should be dismissed on the merits, but without costs.

Judgment accordingly.

Matter of the Estate of ISAAC P. BIELBY, Deceased.

(*Surrogate's Court, Oneida County, July, 1915.*)

WILLS—POWER OF SALE—EXECUTORS AND ADMINISTRATORS—TITLE IN REAL ESTATE—EXECUTORS AND ADMINISTRATORS—OBJECTIONS TO ACCOUNT UPON INFORMATION AND BELIEF—OBJECTION TO PAYMENTS—RIGHT TO DEPOSIT IN CHECK ACCOUNT—COMMISSIONS—OBJECTION TO AMOUNT PAID ATTORNEY OVERRULED.

A general power of sale given in a will to the executrix applying to the entire estate and designed to facilitate its distribution may co-exist with an estate devised in fee.

The will of testator, who was a lawyer, after directing an equal division of all his property, real, personal and mixed, among the children of

his brother, one of whom was a minor, provided: "I authorize and empower my executrix hereinafter named to execute any mortgage, deed or conveyance; to give good title to such property, and carry into effect the provisions of this, my last will and testament; and in case of her death, I give to the administrator, with the will annexed, the same power of sale as the executrix." Under the advice of counsel and without objections from any interested party the executrix sold certain of decedent's real estate through an agent for full value and free of fraud. Upon the judicial settlement of the accounts of the executrix five of the devisees made objections to the agent's commissions and also to the executrix's commissions on the ground that the will contained no power of sale but if it did there was no necessity for its exercise in order to make the will effective. *Held*, that the executrix was invested with a discretionary power of sale valid as a power in trust to convert the land into personalty and that the executrix could convey good title.

That the title of the devisees in the real estate had been divested and an interest in the proceeds of sale substituted therefor.

An objection to an item of \$125, paid by the executrix as broker's commissions on a sale of a part of the real estate, overruled, and said payment allowed.

Upon the judicial settlement of the accounts of an executrix, the account and the objections filed thereto constitute the pleadings and determine what issues shall be tried and limit the examination to such issues.

Objections to an executrix's account to be available must plainly indicate the defects claimed.

An objection to an executrix's account upon information and belief that the indebtedness of the contestant to the estate is not correctly stated, in the absence of a denial of that part of the account involving contestant's interest, raises no issue and the accounting party is not bound to prove her account as against the contestant, and it not having been denied must be deemed to be admitted, and the amount thereof set off against any sum due contestant from the estate.

Where the contested account of an executrix is modified though not sufficiently to wipe out a balance in her favor, an objection to the account that it appears therefrom that the executrix had paid herself more than she was entitled to must be overruled.

An item of twenty-seven dollars and fifty cents paid by the executrix to her husband for painting certain property of decedent allowed.

An objection to a sum paid by the executrix for coal purchased after decedent's death to heat a house of his occupied by her and her family for a period of five months sustained and her account surcharged with the amount of the bill.

An objection to a payment made by the executrix of the balance due

on a land contract which had been assigned to decedent overruled on the ground that on the evidence the executrix was justified in making such payment.

An executrix has a right to deposit in a check account the necessary money belonging to the estate to meet the current expenses of administration without being charged with interest.

An item of twenty dollars paid to the appraiser at the time of the taking of the inventory which was carefully prepared, held not to be unreasonable and the same allowed.

The executrix allowed her commissions, and an objection to the amount paid by her to an attorney for legal services on the ground it was unreasonable and excessive overruled and the amount allowed.

PROCEEDINGS upon the judicial settlement of the accounts of an executor.

F. M. Calder, for executor.

A. S. Malsan, for James A. Bielby, Anna J. Slawson, Grace E. Clauson, Bertha S. Teale and Edna M. Bielby, contestants.

James W. Watts, for Edna M. Bielby, a minor.

SEXTON, S.—The will of the deceased directed his debts to be paid, then provided: "I give and bequeath to the children of my brother, William J. Bielby, of Oriskany, N. Y., all of my property, real, personal or mixed, each of them to share and share alike. Third: I authorize and empower my executrix hereinafter named to execute any mortgage, deed or conveyance; to give good title to such property and carry into effect the provisions of this, my last will and testament: and in case of her death, I give to the administrator, with the will annexed, the same power of sale as the executrix."

Under the advice of an attorney and without objections from any interested party, the executor sold certain real estate of deceased through an agent, for full value and free of fraud, and is now rendering her final account. Objection is made to

the agent's commissions and executor's commissions on the ground that the will conferred no power of sale, but if it did there was no necessity for its exercise in order to make the will effective. From the whole will the intent must be gathered. It is urged that the word "sale" is not used in the language in the will constituting the authority upon which the executor acted, but the word "sale" is used in connection with the power conferred upon a contingent administrator with the will annexed: "I give to the administrator with the will annexed the same power of sale as the executor," indicating that the testator believed that he had already conferred a power of sale upon his executor.

It is contended that the testator having devised all of his property in fee to the devisees named, there was no occasion for the exercise of the power of sale, if any was conferred, as the will contained no provision which required the exercise of the power of sale. The records show that there are eight devisees, children of William J. Bielby, nephews and nieces of the testator, who take under his will, one of whom is a minor. The will is dated June 8, 1911. There are three or four pieces of realty of unequal value, a personal estate of about \$8,000, and a total estate of about \$18,000.

The testator died in about a year after he made his will. While he then had personal property far in excess of his obligations, still he may have anticipated a dissipation thereof before death, hence empowered his executor to "execute any mortgage" necessary to meet his debts and obligations, as well as the expenses of administration. The executor was given a choice to mortgage any or all of the real estate for the purposes suggested, the devisees to take the same subject thereto; or the executor was given power to sell "such property and carry into effect the provisions of this my last will."

The will contains but two provisions; one, the payment of all just debts; the other, an equal division of "All of my prop-

erty, real, personal or mixed, among the children of my brother, William J. Bielby."

The testator was a lawyer, drew the will in question and knew that some of his brother's children had families, were money hungry, critical and impatient with each other, and, if they received the real estate with a minor involved, an exhaustive partition action might follow, as there could be no division of this estate into eight equal parts without a sale or partition of the real estate. There may have been method in what is charged as evidence of testator's madness, to wit: devising his real estate, then empowering his executor to sell "such property and carry into effect the provisions of this my last will."

It appears that a brother, as leader, guided by an attorney, aligned himself with four sisters against the executor from the inception of her duties. On the accounting herein, the same five devisees filed objections attacking eight different items aggregating \$1,403; even the funeral bill of \$402.30 of the testator, on whose bounty they are now feeding, did not escape. It was challenged on the ground that it was "excessive and unreasonable."

The testator well knew his brother's children, they were all over age but one, and he may have anticipated the course on their part which the record discloses, hence evinced a distinct purpose, through a power of sale, to save his estate from waste by turning over to each one, his or her particular share, in money freed of the microbe of litigation and unburdened by attorney's fees.

A general unrestricted power of sale in wills, reflecting such a purpose, has been upheld.

In *Cussack v. Tweedy* (126 N. Y. 81), where the bill under discussion provided: "I hereby authorize and empower my said executors * * * to sell and dispose of the whole or any part or parts of my estate, both real and personal, etc.," the

court upheld the power upon the ground, among others, that it would facilitate the ultimate division of the estate without the expense and delay of an action in partition.

Where the power is unlimited, it permeates and overrides the whole estate, is a doctrine laid down in an English case (*Taite v. Swinstead*, 26 Beav. 525), and approved in *Cussack v. Tweedy* (*supra*).

The following propositions are supported by *Tabor v. Willets* (1 App. Div. 285; *affd.*, 153 N. Y. 663):

A general power of sale given in a will applying to an entire estate, and designed to facilitate its distribution, may co-exist with an estate devised in fee.

A power of sale is not necessarily repugnant to a previous devise on the subject thereof in fee. (*Crittenden v. Fairchild*, 41 N. Y. 289; *Kinnier v. Rogers*, 42 *id.* 531; *Cussack v. Tweedy*, *supra*.)

There is another feature of the power of sale in question deserving consideration. It is urged that the language used by the testator fails in so many words to confer a power of sale. It is true he does not use the words "sale" or "sell" anywhere in the power conferred upon his executor, but concludes his power of sale as follows: "I give to the administrator with the will annexed, the same power of sale as the executrix." The testator when concluding his power of sale evidently had in mind that he had conferred upon his executor a power of sale, else he would not have used the language: "the same power of sale." Where the construction of a will is under consideration, or any paragraph of it, the whole will must be used to aid in ascertaining the meaning; the fact that a bequest or devise, or a power of sale is couched in cloudy language, does not relieve a court from the responsibility of dispelling the clouds and disclosing the sunlight of thought, if any there be.

In *Cahill v. Russell* (140 N. Y. 402), the second paragraph of the will under discussion read as follows: "Until the sale

and conveyance of said premises by my executor as hereinafter provided. I give and devise unto my sister, Catharine Denny, the use of the top floor of the house and premises known as No. 227 East Fifty-second street, New York city, free of rent." No other or further power of sale was given. In delivering the opinion of the Court, Judge MAYNARD said: "It is evident that the testamentary plan which the testatrix had formulated in her mind, contemplated the grant of a power of sale to her executor. If the form adopted to express her intention is ambiguous or incomplete the intent nevertheless should prevail. Formal words are not necessary to create a power and, to quote the language of Sugden: 'However obscurely in a will the intention may be expressed, yet if it appears that a power of sale was intended, a sale will be supported.'"

Gerard on Titles, fourth edition, page 430, in the text on the subject: "Powers Inconsistent with Devise," says: "There has been a question whether a power to sell land by executors, given after a direct and absolute devise in fee, was valid. The general rule is, that a power shall not be exercised in derogation of a prior grant by the appointer. It is held that a power of sale may be exercised notwithstanding a prior devise of the land in question, in case the power appears necessary to carry out the intention of the testator."

Kinnier v. Rogers (42 N. Y. 531), in many features parallels the case at bar, and has long been the leading case on the subject of a general discretionary power of sale in this State. The will there considered contained this clause: "All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath unto my children living at my decease, and the issue of such as may then be dead in representation of its deceased parent, equally share and share alike forever."

This was followed by a distinct and separate clause appointing three executors, and giving authority and power to them,

or such of them as shall qualify, the survivors and survivor of them, to sell all or any part of his real estate at any time, in their or his discretion, at public or private sale, and to execute valid deeds of conveyance for the same to the purchasers thereof. The court held in substance that the testator probably acted in giving the power of sale in reference to the facts and circumstances connected with his family, and the ages of his children. And that the exercise of the power would secure a division of the avails among the parties in interest, without the **delay and expense of an action in partition**, or other judicial proceedings, and the devise was subject to the power, and until it was exercised, the title to the land itself remained vested in the children, and after its exercise they took it in its substituted form.

I am constrained to believe that the testator, Bielby, was similarly influenced and thereby led to grant to his executor a discretionary power of sale. The power of sale given by the testator to his executor was a valid power in trust to convert the land into personalty and that his executor could convey good title. There having been a sale and conversion of the land into personalty under said power, not only without objections on the part of the present contestants, but with their knowledge, and full value having been obtained for the realty, I hold and decide that the title of the devisees in the land has been divested and an interest in the proceeds substituted. (*McCready v. Metropolitan Life Ins. Co.*, 83 Hun, 526.)

The item of \$125 paid by the executor to Mr. Ackroyd, as commissions for selling a part of the real estate is under objection. The executor was a woman without experience in business matters or affairs of the world. She, being one of the devisees, was naturally anxious to obtain the highest possible price for the real estate, and, having no knowledge of such matters herself, did what seems to me to be a very natural thing, secured the services of Mr. Ackroyd, of Whitestown, who

though an undertaker yet had had wide business experience, was a leading and respected citizen of the community and had served as State senator. It was established that Mr. Ackroyd, as agent, for the executor, sold the piece of property in question to the present purchaser at a price not questioned by the most critical of the contestants. It is not charged that the commissions are excessive, but that there having been no power of sale in the will the executor was powerless to incur any legal obligation in connection with the sale of the real estate; but that if there was a power of sale then it was the duty of the executor to have made the sale herself.

The accounting party here is the executor selected by the testator, and was his niece. He knew her mental limitations and business experience, yet selected her. From the standpoint of intelligence and from my observation of her in court and upon the witness stand, I regard her quite the equal of the majority of those who serve in similar capacities. An executor is only required to bring to the discharge of his duties the intelligence which an ordinarily good business man would use in like matters. The rule would be too severe should the surrogate judge the representative wholly upon the results, or in the light of his present knowledge of what has happened. The representative should not be judged by the fuller knowledge which they possess upon the accounting, but rather by the knowledge and facts which were accessible to them at the time they made the decision which they were required to make, and for which they are now being criticised. (Matter of Watson, 92 N. Y. Supp. 195.) Few mistakes would be made by representatives if their forethought was as good as their hind thought, and this is equally true of courts, attorneys and parties who criticise them.

The record shows that the representative's attorney, Mr. Calder, and Mr. Backus, former attorney for the contestant, James A. Bielby, conferred upon the subject of employing an

agent and both agreed that the real estate should be handled by an agent and it also appears that Mr. Bielby's attorney, Mr. Backus, so informed him. No objection was then made by the contestant, Bielby, to the real estate being handled by an agent, hence he should not now be sustained in his complaint. I, therefore, overrule the objection to the item of \$125 paid to Mr. Ackroyd, as commissions for selling the real estate, and allow the same.

It is claimed by contestant, James A. Bielby, that by objection he has placed in issue the question as to whether his indebtedness to the estate, as set out in the account, can be set off by the executor against any amount directed by the decree to be paid to him, on the ground that objection having been filed the burden was on the accounting party to establish the amount of indebtedness of said James A. Bielby, to the estate. No evidence was given by either side.

In Schedule B. of the account, the executor separately charges said James A. Bielby with an indebtedness to the estate arising out of a land contract and four notes, together with accumulated interest up to October 1, 1914, in the total amount of \$2,059.47. Said contestant Bielby's objection thereto is as follows: "James A. Bielby, one of the legatees under the last will and testament of the above named decedent, does hereby object further to the account filed herein by the executor herein, upon information and belief, as follows: 3. That the indebtedness of said James A. Bielby to said estate is not correctly stated in said account."

It is well settled in surrogate's practice that the account filed and objections thereto constitute the pleadings and determine what issue shall be tried and limit the examination to such issues. (*Matter of Heuser*, 87 Hun, 262; *Matter of Woodward*, 69 App. Div. 286; *Matter of Sloane*, 135 App. Div. 703.)

Did the contestant by stating upon information and belief

"that the indebtedness of said James A. Bielby to said estate is not correctly stated in said account" raise an issue?

Unless there is a denial of that part of the account involving said contestant's interests, then no issue has been raised.

The form of pleading used may be termed a covert negative pregnant — pregnant with the admission of indebtedness, but with the actual amount concealed. The contract and note obligations are not denied, nor is the amount claimed by the estate specifically challenged. The objection states no fact which furnishes any light, and the executor could not be expected to correct any error not pointed out. Objections to an account, to be available, must plainly indicate the defect. Representatives of estates and surrogates have no divining rods to aid in the location of subterranean waters or concealed errors. There is no word of denial in the objection, and no new matter alleged.

"The objector to an account * * * is as much bound to set up in such objections any claims which he proposes to make, as the defendant in an action is bound to set up in his answer any claims which he proposes to urge against the plaintiff." (Matter of Archibald Johnston, Deed., 39 N. Y. St. Rep. 521; Matter of Hart, 60 Hun, 516.)

We, therefore, have no general or specific denial of the material allegations of the complaint, or account, as provided by the Code of Civil Procedure, section 500. The executor, or accounting party, was not therefore bound to prove her account as against the contestant, James A. Bielby. Not having been denied, it was admitted. (Wallach v. Commercial Fire Ins. Co., 12 Daly, 387.)

The objection is overruled and the \$2,059.47 must be set off against any sum due said James A. Bielby from the estate, with legal interest from October 1, 1914.

There is another objection filed by the same contestant which is a very near relative to the one just disposed of. It reads as

follows: "That it appears from said account that the executor has paid to herself more than she is entitled to."

There is no evidence in the record upon this subject, outside of the account itself. If she had paid herself one cent more than she is entitled to, the objection would be true. Still I find, on examination of the account, that if the objection was such as the law contemplates, it must be and is overruled. Schedule G. of the account shows a balance of \$16,373.84, subject to the executor's commissions and the expense of the accounting, which is the amount that would be subject to distribution to the eight legatees, if no advancements had been made to them. The executor, as appears from Schedule E., has paid to herself \$2,252.30. Her net distributive share is \$2,046.73, to which must be added \$333.73 commissions, making a total of \$2,400.46, a sum in excess of what she has received of \$148.16. The account of the executor will be somewhat modified by this contest, but not sufficiently against her, to wipe out the balance in her favor of \$148.16.

The item of \$27.50 paid by the executor to her husband for painting property of deceased at Oriskany, upon the evidence, is allowed.

The objection to the item of \$68 paid by the executor for coal which she purchased after testator's death to warm a house of the deceased, occupied by herself and family, from December to the following April, rent free, is sustained, upon the evidence, and her account must be surcharged with said amount.

In regard to the \$165 objected to, claimed to have been paid to Irving Slawson by the executor as the balance due on the Rudolph land contract, assigned by Slawson to the deceased in his lifetime, I find by reference to the evidence that the contestants' attorney established the following upon the trial, on cross-examination of said claimant, Irving Slawson, that said claimant assigned the land contract to the testator about August 1, 1912, that at the time of the assignment the deceased paid

him \$50, that the claimant made no demand for the \$165 during the lifetime of the deceased, because the deceased said he would pay him the balance, and the deceased died in about four months thereafter without having paid the same. This evidence is undisputed and having been brought out by the contestants' attorney he is bound by it, and, taken in connection with all the other evidence in the case upon this subject, the executor was justified in paying the same, and the objection thereto is overruled.

The executor kept certain funds in a non-interest bearing account, which she drew checks against from time to time to meet obligations of the estate. By objection it is sought to have the executor charged with interest on this account.

"The executor or administrator is chargeable with interest, or even compound interest, without reference to the question of delay or negligence, if the moneys have been applied by him to his own use. In all cases where the executor has been held liable for interest on funds in his hands, one or more of the elements or facts of personal use of funds, mingling the same with private moneys, unauthorized investments, failure to follow clear and specific directions as to the disposition of funds, retention of the funds where there was no reasonable excuse for so doing, or other circumstances showing a clear case of negligence, are present; and where these elements are all absent the executor will not be charged interest on money in his hands." (Redfield's Law and Practice [4th ed.], 497, and cases cited.)

The evidence discloses none of the conditions above set out, warranting an interest charge personally against the representative. The executor kept an account in the Citizens Trust Company, at Utica, N. Y., and in the Utica Trust and Deposit Company, both at interest. The principal item withdrawn from the Citizens Trust Company was \$1,000 paid to one of the legatees, Isaac P. Bielby, and the withdrawals from the Utica

Trust and Deposit Company, as appears from the exhibits, were to pay the funeral bill and other expenses of administration. There was on deposit with the Oneida National Bank, without interest, \$6,160.83, from which \$5,975.78 was checked out to different legatees and devisees under the will, and for estate expenses, leaving a balance of \$185.05 in the bank.

An executor has a right to deposit in a check account the necessary money belonging to the estate to meet the current expenses of administration, without being charged with interest. All interest earned by the estate in the different banks has been duly accounted for. No evidence was given tending to establish that by wiser or more frugal management of the estate any more interest could have been earned than appears in the account. The objection is therefore overruled.

The item of \$402.30, the undertaker's bill, headstone and other expenses incurred in connection with the burial of the testator, was objected to as "unreasonable and not a proper charge against the estate," but it may be said in justice to the contestants, that they withdrew all objections on the trial to said item, upon learning the facts in regard to the same.

Objection was filed to an item of \$20 paid to appraiser Ackroyd, upon the ground that it was excessive. A typewritten inventory was filed, showing about 232 items in eleven rooms, each room being separately inventoried, besides some securities and articles of personal property at testator's office in the Law Library, at Court House, Utica, N. Y. The total personal estate as shown by the inventory amounted to \$8,987.72. Each item was described and value given. In view of the size of the estate and the care shown in the preparation of the inventory, I do not deem \$20 an unreasonable charge and allow the same.

There is another matter which, though presenting itself in a very unusual way, still because of the fact that a minor is involved attention must be given to it by the court.

The special guardian in a moment of aberration, or wholly

misconceiving the practice as to pleadings in this court, filed a general formal answer used in the Supreme Court in partition and other actions, alleging: "that he is a stranger to all and singular of the matters and proceedings in said petition, set forth, and submits his rights as such guardian and of the rights of said minor in the above named estate to the court for its protection thereof."

There is nothing set forth in the petition involved in this accounting. Apparently the only redeeming feature in the attempted pleading is a frank confession that the special guardian "is a stranger to all and singular of the matters and proceedings." It is the duty of a special guardian, upon his appointment, to cease to be a stranger to all matters involving the minor's interest, and to so inform himself as to the condition of those interests as to be able to intelligently and legally act at all times in court in the infant's behalf. In mitigation of the oversight of the special guardian, it may be said as a general rule many attorneys are very competent as specialists, and, when taken out of the field of their general activity and placed at the four corners of the law, they may fail to take the proper highway. While the special guardian failed to comply with the rule laid down in *Matter of Archibald Johnston (supra)*, requiring the objector to set out in such objections any claims that he proposes to make against the administrator, still in a very creditable brief, having called attention to the lack of provision in the account for interest, which the law provides shall be paid on general legacies after one year, it becomes the duty of the court, as an auditing officer, to act independently before approving and allowing the account and the court should feel particularly so inclined in the case of a minor, or incompetent person. (*Matter of Parr*, 45 Misc. Rep. 564.)

It appears from the records of this court that on December 23, 1912, letters testamentary were issued to Christy Ann Slawson. Section 2721 of the Code, before the amendment in effect Sep-

tember 1, 1914, provided: "No legacy shall be paid by an executor or administrator until after the expiration of one year from the time of granting of letters testamentary, or of administration, unless directed by the will to be sooner paid." The will makes no reference to the time for the payment of legacies. It is therefore fixed by statute. "After the expiration of one year, the executor or administrator must discharge the specific legacies bequeathed by the will, and pay the general legacies, if there be assets." (Code Civ. Proc., *supra*.)

It therefore appears that after the expiration of one year the legacy is due and it follows as a matter of law that interest begins to run on a legacy from the time when it is payable. The rights of a legatee are not affected by the fact as to whether the assets of the estate have been fruitful or unproductive. He is in the same position as a creditor, and is entitled to be awarded interest at the legal rate for such time as he is kept out of his demand. (Matter of Oakes, 19 App. Div. 192; Hoffman v. Pennsylvania Hospital, 1 Dem. 118; Matter of Frankenhimer, 195 N. Y. 346; Matter of Rutherford, 196 id. 311.)

The minor, Edna M. Bielby, is now upwards of twenty years of age, and in an apportionment of the household effects she received articles agreed to be worth \$34 to apply on her share of the estate. I therefore hold and decide that said infant, Edna M. Bielby, is entitled as legatee and devisee to an equal undivided one-eighth of the net estate herein, less \$34, with interest on the balance from December 22, 1913, at the rate of six per cent, until November 23, 1914, the return day of the citation on the judicial settlement. This interest date is fixed because the estate has been involved in litigation since.

The point is made by the special guardian on behalf of the infant, that the executor advanced to legatees and to herself moneys of the estate before a year had expired after letters testamentary had been issued, hence interest should be charged on the amounts so advanced from the time thereof until the

expiration of the said year, at the rate of five per cent. The account shows that the executor advanced to Bertha S. Bielby (now Teale) on account of her share of the estate, \$1,000 August 19, 1913, and advanced to Grace E. Clauson, \$700 August 7, 1913, \$10 September 13, 1913, and \$290 September 16, 1913, and to Julius Bielby, \$400 October 20, 1913, and to Anna J. Slawson, \$1,000 August 11, 1913, and to Isaac P. Bielby, \$1,000 October 17, 1913, and to herself, \$1,000 March 26, 1913, and \$1,200 June 13, 1913.

Section 2721 of the Code, in effect prior to September 1, 1914, governs the payment of legacies and provides: "No legacy shall be paid by an executor or administrator until after the expiration of one year from the time of granting letters testamentary, or of administration, unless directed by the will to be sooner paid."

The will contains no direction as to the payment of legacies, hence no legacy could be legally paid until after the expiration of one year from the time of granting letters testamentary or of administration. It was the duty of the executor to keep the money of this estate at interest. The law is clear upon the subject, and the legatees who received portions of the estate before they were entitled to it are presumed to know the law and must respectively make the estate good for interest lost by reason of the premature advancements on their shares, as above set forth. It would not be equitable to charge them with more interest than the money advanced to each of them was earning at the time of the advancement, which was three and one-half per cent. I therefore hold and decide that interest at three and one-half per cent. be deduced as follows: From the share of Bertha S. Bielby (now Teale) on \$1,000 from August 13, 1913, to November 22, 1914; from the share of Grace E. Clauson, on \$700 from August 1, 1913, to November 22, 1914, on \$10 from September 13, 1913, to November 22, 1914, on \$290 from September 16, 1913, to November 22,

1914; from the share of Julius Bielby on \$400 from October 20, 1913, to November 22, 1914; from the share of Anna J. Slawson, on \$1,000 from August 11, 1913, to November 22, 1914; from the share of Isaac P. Bielby, on \$1,000 from October 17, 1913, to November 22, 1914, and from the share of Christy Ann Slawson, on \$1,000 from March 26, 1913, to November 22, 1914, and on \$1,200 from June 13, 1913, to November 22, 1914.

Objection was made to the item of \$520 paid by the executor to her attorney, Mr. Calder, for legal services, on the ground it was unreasonable and excessive. On the trial, Mr. Calder, under oath, detailed with marked particularity the dates and amount of time spent, as well as the subject under advisement, the services which he rendered to the executor. While it is true that a certain amount of the work is such as a representative generally is expected to perform for commissions, still in this particular case, an inexperienced woman was executor, and, with a full knowledge of her lack of business experience, she was selected by the testator to take charge of his estate. The evidence shows that there was considerable friction from the beginning between the representative of the estate and some of the legatees and devisees. An attorney was employed by them, who had conferences with Mr. Calder on various matters, and a sharp question arose as to whether or not the will empowered the executor to sell the real estate. That question had to be disposed of in advance of the judicial settlement, and, as the court views the will, Mr. Calder correctly interpreted it for the executor and rightly guided her in all matters pertaining to the estate, except upon the question of advancing money upon the legacies, and the coal bill of \$68, and except one other item of \$77. commissions paid to the husband of the executor for selling a piece of real estate. Over the latter item there was no contest, as it was voluntarily withdrawn as soon as objection was filed. In an estate composed of personal property and real estate aggregating about \$18,000, and concerning the manage-

ment of which considerable friction arose, and in view of the fact that there were seven different people to contend with, six of whom objected to various items of the account and precipitated a very stubborn contest, resulting in no material change in the account, and also in view of the evidence of Mr. Calder that he agreed with the executor that the sum paid him should be in full for his services, including the accounting and the contest, and that no application would be made for a further allowance, or costs, I hold and decide that the sum of \$520 was reasonable and the same is hereby allowed and objection thereto overruled.

The account shows that Mr. Ackroyd, the agent who sold the real estate, was paid \$126, and the voucher signed by him shows that he received \$125. There is a discrepancy of \$1 in favor of the executor that she was unable to account for definitely on the witness stand. The account must, therefore, be surcharged with the same.

During the trial objection was made in open court to the allowance of commissions to the executor, partly on the ground that work which she should have done herself, she employed her attorney to do, and on the ground that there being no power of sale under the will she should not have commissions on the proceeds of the real estate that passed through her hands.

On a careful review of the evidence, keeping in mind her conduct and management of the entire estate, as well as the difficulties with which she was constantly confronted, reference to which has already been made, and no specific act of misconduct having been shown, no careless or negligent handling of the moneys of the estate having been established, and no comingling thereof with her personal funds, and no dealing with the property as if it were her own, I feel that on the whole, the estate was as well managed as is usual among representatives similarly situated, and finding no legal reason for denying commissions, I allow the same.

Decreed accordingly.

Matter of the Estate of GEORGE RALPH, Deceased.

(*Surrogate's Court, Oneida County, July, 1915.*)

WILLS—GIFT TO CLASS—WHEN STATUTE OF LIMITATIONS NOT AVAILABLE—TRUSTEES.

A will of personal estate is presumed to speak with reference to the time of testator's death.

A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift to be ascertained at a future time who are all to take in equal shares or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number.

A clause of a will in no manner relating to or connected with all the other provisions of the instrument provided: "I give and bequeath to my son George Ralph, Jr., and my daughter Lydia Fish, and the survivor of them, the sum of \$6,000 in trust to invest the same in such securities as they may deem proper, and receive the interest thereon as it accrues, and pay the same as it is received by them over to Jane, widow of my deceased son, William Ralph, for and during her natural life and in further trust upon the death of said Jane Ralph to pay over the said sum of \$6,000 and the interest due thereon, in equal shares to the children of my said son William." At the time of testator's death there were living five children of his deceased son William. *Held*, that one of said children, a married daughter, who died before her mother and without issue, took an undivided one-fifth share of the principal of the trust fund with accumulations, if any, and that her husband as administrator of her estate was entitled to maintain a proceeding to compel an accounting by the trustee in charge of the funds.

It appearing that the substituted trustee from the time of the death in 1905 of the mother of testator's grandchildren down to 1913 had on many occasions in conversation with their father promised him to render his account as trustee in the near future and giving on each occasion some trivial excuse for postponement, the Statute of Limitations was not available to the trustee to bar an accounting.

PROCEEDING against a trustee for an accounting.

R. B. Richards (Geo. A. Kernan of counsel), for Charles McKinney, petitioner.

John G. Gibson, for George J. Ralph, testamentary trustee.

SEXTON, S.—George Ralph died in March, 1881, leaving a will which was duly admitted to probate in this court May 4, 1881. Among its provisions was the following:

“*Seventh.* I give and bequeath to my son George Ralph, Jr., and my daughter Lydia Fish, and the survivor of them, the sum of \$6,000 in trust to invest the same in such securities as they may deem proper, and receive the interest thereon as it accrues, and pay the same as it is received by them over to Jane, widow of my deceased son, William Ralph, for and during her natural life and in further trust upon the death of said Jane Ralph to pay over the said sum of \$6,000 and the interest due thereon, in equal shares to the children of my said son William.”

The foregoing provision must be construed independent of all the other provisions of the will, as they are not in any manner related to or connected with said seventh provision. It appears that at testator's death the following children of his son, William Ralph, were living: Edwin J. Ralph, William C. Ralph, George J. Ralph, Mary E. Ralph and Lydia J. Ralph. Thereafter Mary E. married Charles McKinney, petitioner herein; and Lydia J. became Lydia J. Cummings by marriage. The trustees named qualified and died before said Jane Ralph. Thereafter and on June 18, 1894, George J. Ralph was appointed successor trustee by a decree of this court and duly entered upon the discharge of his duties as trustee and is now trustee of said fund; that said Jane Ralph died April 12, 1905, thereby terminating said trust and releasing the fund to the beneficiaries as provided by said seventh provision of the will in question. That at the time of the death of said Jane Ralph, only two of the children of said William Ralph were living, viz., William C. Ralph, who has since died, and said George J. Ralph, the present trustee; that said Mary

E. McKinney died March 23, 1893, without issue and leaving her husband, Charles McKinney, the petitioner, surviving her, who was thereafter duly appointed administrator of her estate, and is now acting as such. In the spring of 1888, said Mary E. McKinney and her said husband, Charles McKinney, adopted a little girl under the name of Merl McKinney, the legality of whose adoption is not questioned. Said George Ralph as trustee has never accounted, nor taken any proceedings to that end, nor paid over any portion of said trust fund to said Charles McKinney, individually, or as administrator of the estate of his said deceased wife, Mary E. McKinney.

That a petition was heretofore filed in this court and a citation issued February 11, 1915, to said George J. Ralph, as trustee, to show cause why he should not account herein. On the return day of the citation said trustee, by answer, denied that the petitioner, either individually, or as administrator of his wife's estate, had any right or interest in said trust fund, or any right to demand an accounting of the trustee thereof, and also that more than six years had elapsed since petitioner's alleged rights accrued, and that his rights, if any he had at any time, were barred by the Statute of Limitations.

The trustee contends that the clause — "upon the death of said Jane Ralph," fixes the time when the children of William Ralph were to take under said seventh clause; and that those then living would represent a class and take the whole gift.

The first proposition is untenable for the reason that in this State the doctrine is firmly established that in a will of personal estate the testator is presumed to speak with reference to the time of his death. (*Lynes v. Townsend*, 33 N. Y. 558.)

"Words of survivorship and gifts over on the death of the primary beneficiary are construed, unless a contrary intention appears, as relating to the death of the testator." (*Nelson v. Russell*, 135 N. Y. 137.)

The words "from and after" used in a testamentary gift of

a remainder, following a life estate, unless their meaning is enlarged by the context, are to be regarded as defining the time of enjoyment simply, and not of the vesting of title. (*Hersee v. Simpson*, 154 N. Y. 496, and cases cited.)

In *Livingston v. Greene* (52 N. Y. 118), the testator, after having given a life estate to his wife in all of his real estate, then provided: "From and after the decease and death of my beloved wife, I give and bequeath all my real estate then being * * * to all my children, and to their heirs and assigns forever, to be equally divided, share and share alike, * * * after the death of my beloved wife, I give to my son, **John A. Livingston**, one equal share;" and so, naming all his eleven children. All of the testator's children survived him, but several of them died before his widow. It was claimed that the children so dying before the widow took no estate; that if they took a vested remainder at testator's death, still it was defeated by their failure to survive the widow. The court's answer was — "It cannot be denied that the children of the testator, under this will, took a vested remainder in his real estate at his death."

The will of the testator, Ralph, was dated August 12, 1880, and he died in the following March. The widow and five children of his deceased son William survived him, hence each of said children then took an undivided one-fifth part of said gift of \$6,000, subject to the life use of their mother, Jane Ralph. Jane Ralph died April 12, 1905, and of her said five children only two survived her, one of whom has since died. The survivor is the trustee, herein, who claims the entire gift of \$6,000 with its accumulations, on the theory that said gift was to a class and he being the sole survivor, of course, represents the class and takes the whole gift.

From a business standpoint this is a very attractive proposition, but from a legal point of view it is without support, unless I have utterly misconceived the law.

A gift to a class is a gift of an aggregate sum to a body of persons, uncertain in number, at the time of the gift, to be ascertained at a future time, who are all to take in equal, or in some other definite, proportions, the share of each being dependent for its amount upon the ultimate number.

At the time the testator made his will, being the time of the gift, the number to be benefited thereby was certain, as there were then living five children of his deceased son, William, and he knew it. When the testator said — “in equal shares to the children of my said son, William,” he as distinctly designated the several beneficiaries as though he had described them by name. The number could not change except by death among the beneficiaries. The number could not become uncertain by increase as their father died before testator made his will.

In *Matter of King* (200 N. Y. 189), now the leading case upon the subject of “gifts to a class,” the will provided, that the executors as trustees should sell certain real estate in New York, “and divide the entire proceeds of such sale equally between the nephews and nieces of my late husband, being the children of his brother, Rufus S. King, of New York, who were living at the death of my late husband, and the children also of his sister, Margaret M. Petty, of Orient, Long Island, share and share alike, to them and their heirs.”

It will be observed that the bequest was to the nephews and nieces of the deceased husband of the testatrix who were living at the time of his death. The court said: “That was as distinct a designation of the several beneficiaries as though they had been described *nominatim*. It was as though testatrix had named nine persons and had added — ‘I give to these nine nephews and nieces of my late husband, who were living at the time of his death, the proceeds of my New York house, share and share alike.’ There can be no doubt, we think, that this was a gift to designated persons in being at a specified time which antedated the death of the testatrix, and that there

was a lapse of the shares of those who did not survive her." The conclusion of the court was — "that the surviving nephews and nieces take only their own shares; that there was a lapse of the shares of the five who predeceased the testatrix, and that these five shares passed into the residuary estate by virtue of the fifth clause of the will."

My conclusion, therefore, is that said Mary E. McKinney, whose interest only is involved herein, having survived the testator, took an undivided one-fifth part or share of said gift of \$6,000, with its accumulations, if any, and her said share constitutes a part of her estate to be disposed of as provided by law; and that her said husband, Charles McKinney, who is administrator of her estate, is entitled as such to maintain this proceeding as provided by chapter 18, title 5, article 1 of the Code of Civil Procedure, unless the Statute of Limitations constitutes a bar.

While the Statute of Limitations is intended as a quieting powder for stale claims, still its use as a bludgeon should not be countenanced.

In *Matter of Irvin* (68 App. Div. 158), in a proceeding to compel an accounting the court said: "A person obtaining possession of property as executor should not be permitted to acquire title thereto by failure of those interested to require him to account, unless there is no avenue of escape from such an inequitable result.

In *Matter of Meyer* (98 App. Div. 7), in a proceeding to compel an executor to account after thirteen years had elapsed between the time letters testamentary were issued and the date of the application, the executor by answer set up the Statute of Limitations to defeat the proceeding. The court said: "By virtue of the relation thus created the executor became trustee of those persons entitled to take pursuant to the provisions of the will. Occupying such relation, the Statute of Limitations would not begin to run until by some act sufficient for the pur-

pose he repudiated his liability as trustee." (Matter of Jones, 51 App. Div. 420.)

In Matter of Jones (*supra*), the court said: "The rule is that as long as there is a subsisting and continuing trust, acknowledged or acted upon by the parties, the statute does not apply; but if the trustee denies the right of his *cestui que trust* and the possession of the property becomes adverse, lapse of time from that period becomes a bar in equity." (Reitz v. Reitz, 80 N. Y. 538; Mabie v. Bailey, 95 id. 206; Davis v. Davis, 86 Hun, 400; Hamer v. Sidway, 124 N. Y. 538; Zebbley v. Farmers Loan & Trust Co., 139 id. 461.)

So far as the record discloses, there has been no repudiation of the trust relation, and if there had been it would have to be set up in the answer. Nothing contained in the answer discloses any more than mere lapse of time, and this in itself would not be sufficient, because in order to make the statute available there must have been such a lapse of time after the repudiation of the trust relation, for unless he has repudiated his trust relation, he will remain liable, and this is nowhere asserted in the answer, nor does it otherwise appear. (Matter of Meyer, *supra*.)

In Matter of Camp (126 N. Y. 377), the court laid down the rule that a general guardian occupies the position of a trustee so far as to prevent the running of the Statute of Limitations in his favor regarding the property entrusted to him, and that so long as the property remains in his possession as guardian and unaccounted for he must remain liable to account.

It seems that executors, administrators, general guardians and trustees are all classed as trustees. They are handling other people's money in a fiduciary capacity, and, whenever the question of calling any one of them to an accounting by an interested person has been before the courts, they have rarely escaped by pleading the Statute of Limitations, or a repudia-

tion of the trust. It seems strange that any honest man or woman, knowingly holding property belonging to another, or in which others are interested, should resort to any excuse, legal or otherwise, hoping to postpone the day of accounting, to the end that he or she may ultimately personally profit, possibly by death, or lapse of time.

The following question was certified to the Court of Appeals in *Matter of Asheim* (185 N. Y. 609): "*First*. Is an executor who has duly qualified and received assets of his testator's estate, for which he has never accounted, so far a trustee as to bring him within the rule that the Statute of Limitations does not commence to run in favor of a trustee, against one otherwise entitled to an account, until such trustee has repudiated his trust?" And the Court of Appeals answered in the affirmative.

The record shows that the said trustee from the time of the death of said Jane Ralph in 1905 down to 1913, on many occasions, in conversations with the petitioner, promised him that he would render his account as trustee in the near future, and giving on each occasion some trivial excuse for postponement.

I, therefore, hold and decide that the Statute of Limitations is not available to the trustee in this proceeding, and that an order may be entered requiring him to account as trustee herein.

Decreed accordingly.

Matter of the Probate of the Alleged Last Will and Testament
of ERIE TALBOT, Deceased.

(*Surrogate's Court, Otsego County, July, 1915.*)

WILLS—DUE EXECUTION OF *—TESTIMONY ON PROBATE CONSIDERED—WHEN
PROBATE MAY NOT BE DENIED.

Testimony on a proceeding to probate a will considered, and *held* that testator at the time of the execution of the instrument had full testamentary capacity, and that there was no proof that undue influence was practiced upon him at such time.

A will duly executed by a competent testator free from restraint at the time of its execution may not be denied probate on the ground that testator did not sign his name at the end of the instrument where it appears that there was no date inserted at the beginning of the will nor in the body of it, nor above the signature of testator, the only date appearing just below the attestation clause.

PROCEEDING upon the probate of a will.

Ulysses G. Welch, for Ulysses B. Talbot and Cora A. Talbot.

Arthur W. Morse, for May P. Cole, contestant.

BALDWIN, S.—This is a proceeding for the probate of the alleged last will and testament of Erie Talbot, deceased. At the time of his death he was the owner of real and personal property of the value of about \$3,500. He was about eighty years of age and considerably weakened by the natural infirmities of old age. He left one son, Ulysses B. Talbot, and one daughter, May P. Cole. The son was married and his wife, Cora, is named in the will as one of the legatees. The will gives \$500 to the surviving daughter and the balance of the property is given to the son and the son's wife jointly in such a

* See note, Vol. X, p. 422.

manner that in case of the death of one of the two the survivor takes the whole. The deceased had apparently been disturbed toward the close of his life by the domestic troubles of his daughter. Her husband had committed suicide and very promptly thereafter she had married a man named Cole, with whom she became acquainted in her husband's lifetime. This man, Cole, had had a former wife who had secured a divorce from him and the daughter and Cole apparently were obliged to leave the State to marry. From the record I am convinced that this marriage was distasteful to her father, and these surrounding circumstances doubtless had considerable to do with his determination not to divide his property equally.

In his last illness the deceased made the will in question. It was prepared by his attending physician, who testified very strongly as to the testamentary capacity of the deceased at that time. This physician is a man of good standing in the community and it was not disclosed that he had any possible interest in the controversy. The other witness to the will, L. J. Bixby, was entirely disinterested and was in a position as a layman to judge intelligently as to the testamentary capacity of the deceased at the time. This witness expressed the opinion, without hesitation, that at this time the testator was of sound mind and memory and in all respects capable of making a will. The witness, Campbell, had had previous experience in the preparation of wills and set forth in detail what took place at the time of its execution and publication. The witness — Bixby — appeared to be unable to remember all of the circumstances of the execution, as well as the witness Campbell, but this might be regarded as natural because he was not charged with any feeling of responsibility in regard to the preparation of the instrument and its due execution. I was convinced as to the truthfulness and sincerity of these witnesses as well as their disinterestedness. Their testimony, together with the attestation clause, which latter is always to be con-

sidered, was sufficient to make a *prima facie* case for the admission of the will to probate.

The contestant, May P. Cole, then called as her only witnesses, her two sons, their respective wives, and her second husband, Robert Cole. These witnesses testified to some weakness of mind on the part of the testator. Much of their testimony refers to the natural weaknesses attending old age, without necessarily affecting the testamentary capacity of the deceased. They gave some testimony indicating to my mind probable delirium, but their testimony as to dates was quite unsatisfactory. It appeared generally that when this condition was observed a Mrs. Dutton was working or staying there at the house, but toward the close of the case it was established that Mrs. Dutton did not go there until January first. The will in question was executed December 15, 1914, at which time it had not then become necessary to give any quieting medicine to the testator as testified to by the attending physician. The decline of the old gentleman after the execution of the will was quite marked, and toward the latter part of the month of December it became necessary to give opiates, which might have accounted for the delirium, as testified to by the members of the family of the contestant. Such a condition of delirium was shown not to exist at the time of the execution of the will, and there was no proof whatever that the deceased was laboring under any delusion at that time. None of contestant's witnesses testified that they were impressed that the acts and conversations of the deceased, as testified to by them, were irrational. The witnesses for the contestant must be regarded as interested ones.

At the close of the testimony in behalf of the contestant, I was inclined to think that the contestant had not introduced sufficient evidence to cast the burden again upon the proponent. Nevertheless, the proponent then called six witnesses who were entirely disinterested and whose testimony carried much weight. They stated the facts and conversations had with

the deceased at about the same time of the making of the will, and these witnesses detailed such conversations and stated that the conversations and acts of the decedent, as testified to by them, impressed them as rational.

Taking the record as a whole, I am convinced that the deceased had full testamentary capacity at the time of the execution of the will in question. I am unable to hold from the evidence that any undue influence was practiced upon the deceased to bring about the making of the will in question. The question of undue influence cannot rest upon surmises of what might have been done or what might have taken place. Proof must be submitted upon which the court can act and determine. I fail to find in the record any such proof. It is true that there appeared to be considerable feeling between the son and the daughter — or more particularly between the son's wife and the daughter. This feeling was more marked against the husband of the daughter who had seemed to take an important part in bringing about this distressing situation near the close of the life of the aged testator.

There is one other question very strongly urged by the contestant and that is the claim that the testator did not sign his name at the physical end of the instrument. There was no date inserted at the beginning of the will, nor in the body of it, and there is no date above the signature of the testator. At the close of the attestation clause, or just below it, and opposite the signatures of the witnesses, the scrivener — who was not a lawyer but the attending physician — inserted these words: "Burlington, N. Y., December 14, 1915." There is no law which requires a will to be dated; neither is an attestation clause required to be dated. It is just as important — and perhaps more so — for the attestation clause to be dated as it is for the body of the will to bear date. In the will in question, the disposing provisions are not conditioned in any manner by the date written at the end of the attestation clause. The scri-

vener may have believed it as important with reference to the acts of the witnesses in signing the will to allow the attestation clause to show the date that they performed their important service.

It must be recognized, as established by the courts in this State, that a will must be signed at the physical end of the instrument in order to make a valid will, but I look upon the will in question as having been properly signed by the testator at its physical end and must decline to go below the attestation clause and there seek the date and say that such date must necessarily be treated as a part of the body of the will. To my mind, such a suggestion is too far-fetched to be considered as interfering with the legality of a will proven to have been properly executed by a competent testator, free from restraint at the time of its execution.

The will should be admitted to probate and a decree may be entered accordingly. . .

Probate decreed.

Matter of the Estate of GILBERT S. HIGGINS, Deceased.

(*Surrogate's Court, Tompkins County, July, 1915.*)

JURISDICTION—OF SUPREME COURT—REGULARITY OF ASSIGNMENTS—WHEN EXAMINATION OF RESPONDENTS UNNECESSARY—WHEN PROCEEDING IN SURROGATE'S COURT DISMISSED.

Where upon the return of an order granted for the examination of respondents upon the petition of an administrator alleging that respondents have the custody, possession or control of a certain real estate mortgage which had been assigned by petitioner's intestate to one of the respondents and by him to the other respondents, both assignments being regular in form, the answers allege possession, custody and title in one of the respondents and set forth the transaction, means and sources of title with a full statement of the records thereof and place of recording, an examination of respondents is unnecessary.

The trial of the issues raised by the petition and answers is exclusively within the jurisdiction of the Supreme Court and the proceeding in the Surrogate's Court will be dismissed.

PROCEEDING for the discovery of property.

David M. Dean (Wm. Nelson Noble, of counsel), for petitioner.

Miller & Stephens, for respondents.

SWEETLAND, S.—The administrator presented a petition, prepared in conformity with section 2675 of the Code of Civil Procedure, alleging in substance that the respondents have the custody, possession or control of property of the intestate. Whereupon an order for the examination of the respondents was duly granted, proper service made, and the respondents appeared in court on the return day of the order, interposed an answer raising an issue of title and setting up claim of ownership. The property in question is a real estate mortgage, which was assigned during the lifetime of the intestate to the respondent Robert L. Speed, and thereafter by him assigned to the respondent Romelia A. Speed, both assignments being regular in form. The answer concludes with the allegation that the said Romelia A. Speed is now the owner and holder of said mortgage.

The determination of the question herein involves the construction of sections 2675 and 2676 of the Code of Civil Procedure as amended and in effect on the 1st day of September, 1914. In this consideration we are but little aided by judicial decisions, inasmuch as there are but few reported cases where those sections have been considered since the revision.

The respondents claim the right to a jury trial by their answer, and insist that they ought not to submit to an examination inasmuch as it would be needless, and would enable the

petitioner to make the respondents witnesses and deprive them of the benefit of section 829 of the Code of Civil Procedure, and thereafter and on the trial respondents might be precluded from testifying as to personal transactions with the decedent. The former section 2709 of the Code of Civil Procedure is partly embodied in section 2676 of the present Code, but the former section contained this important provision: "If the witness is examined concerning any personal communication or transaction between himself and the decedent, all objection under section 829 to his testimony as to the same in future litigation is waived. Either party may produce further evidence in like manner and with like effect as on a trial." This important qualification finds no place in section 2676 of the Code of Civil Procedure, which reads as follows: "If the person directed to appear submits an answer denying any knowledge concerning, or possession of, any property which belonged to the decedent in his lifetime, or shall make default in answer, he shall be sworn to answer truly all questions put to him touching the inquiry prayed for in the petition. If it appears that the petitioner is entitled to the possession of the property, the decree shall direct delivery thereof to him. If such answer alleges title to or the right to possession of any property involved in the inquiry, the issue raised by such answer shall be heard and determined and a decree made accordingly."

The answer does allege possession, custody and title in one of the respondents, and sets forth the transaction, means and sources of title, with a full statement of the records thereof and place of recording.

The respondents, by their answer, have made unnecessary an examination, and the only remaining question before the court is the consideration of the trial of the issues raised by the petition and answers. This view seems to be in harmony with the *Silverman Case* (87 Misc. Rep. 571), and the *Capria Case* (89 id. 101), wherein Surrogate Fowler discusses the sections under consideration. We also have text-book authority in

Heaton on Surrogate's Court (Vol. 2, p. 1055), as follows: "An answer may be submitted by the respondent denying possession, or unlawful possession, or any knowledge of the subject matter, or he may fail to answer, in either of which cases he shall be examined, and a decree made in accordance with the facts. Such a decree will affect the possession or right to the possession of the property mentioned. If, however, the respondent files an answer raising an issue of title, or alleges a right to possession, then such issue shall be tried in the usual manner of a trial, instead of an examination being held. Such trial must be before the surrogate or before the surrogate and a jury, as the parties elect."

The words of Judge Heaton, because of his wide experience, as well as his intimate knowledge of the work of the revision committee, are helpful in considering this question. So under the case presented, an examination ought not to be had, and is therefore denied.

The respondents demand settlement of issues and a jury trial. If their demand is to be granted, it must be on the theory that the Surrogate's Court has concurrent jurisdiction with the Supreme Court in this matter. It will be necessary for a proper determination of the questions involved to determine the effect and validity of the two assignments of mortgage involving equity jurisdiction and powers, which I believe the Constitution has not yet vested in the Surrogate's Court. I am supported in this view by the opinions of surrogates of experience, who are now serving in the Constitutional Convention, who believe the jurisdiction of the Surrogate's Court is limited in this respect, and have introduced in that convention a proposed amendment to the present Constitution, giving to Surrogate's Courts jurisdiction to determine whatever question may arise in proceedings in that court. Such amendment would be unnecessary if the Surrogate's Court now possessed that jurisdiction. I am convinced that it was not the intention of the legis-

lature to vest in the Surrogate's Court the equity jurisdiction which the respondents seek to invoke herein. I know of no authority to justify the Surrogate's Court in entertaining a proceeding to set aside conveyances. This we have assumed to be a function of a court of equity. A situation is herein presented wherein the relief sought by the petitioner is beyond the jurisdiction of this court. The proposed trial would involve questions which we have supposed to be exclusively within the jurisdiction of the Supreme Court and not within the jurisdiction of the Surrogate's Court.

I believe the proceedings should be dismissed, but as the law is unsettled and the questions new it ought to be without costs to either party as against the other. The administrator, if he desires to pursue the matter further, may begin an action in the Supreme Court for the relief to which he believes he is entitled, without the embarrassment of jurisdictional questions therein arising. This dismissal is without prejudice to the bringing of an action in Supreme Court.

Decreed accordingly.

Matter of the Petition of JENNIE M. KNAPP, Residuary Devisee, for a Construction of the Last Will and Testament of SALINUS CONKLIN, Deceased.

(Surrogate's Court, Rockland County, July, 1915.)

EXECUTORS AND ADMINISTRATORS—WHAT IS A CHARGE ON REAL PROPERTY—WILLS—CONDITIONAL LEGACY.

Where prior to the death of testator's widow his personal estate had been fully administered and applied in accordance with the terms and provisions of his will, a legacy of \$500 given "to the trustees of the Re-

formed Church at Tappan" on condition that they keep testator's family burial plot in good order, etc., is a charge upon the real property which comprises testator's residuary estate.

PROCEEDING for construction of a will.

Frederick G. Grimme, for petitioner.

Wallace B. Lydecker, for Reformed Church, of Tappan, legatee.

MCCAULEY, S.— This proceeding was instituted under and in accordance with the provisions of section 2615 of the Code of Civil Procedure to obtain a judicial construction of the fourth clause or paragraph of the last will and testament of Salinus Conklin, deceased, the petitioner being the residuary devisee.

The testator died January 1, 1892, and his will was admitted to probate by the Surrogate's Court of this county February 5, 1892.

It is conceded by counsel that the authority of this court to determine the validity, construction or effect of any testamentary disposition of property in a special proceeding taken for that purpose in accordance with the provisions of the above section, as amended and in force since September 1, 1914, is made applicable to the will under consideration by the provisions of section 2769.

The will, in its opening clause, contains a direction to the executors to pay all of the testator's just debts, funeral and testamentary expenses. By the first item a legacy of \$1,000 is bequeathed to Josephine Blauvelt; and by the second item certain real property, with the buildings thereon, is devised to Lawrence W. Campbell in fee simple. The third and fourth items are as follows:

“Third. I give to my beloved wife all of my personal property, except the \$1,000 above named, absolutely. I do also give her the use and benefit of all the real estate of which I may be possessed at the time of my decease, with the privilege of selling any part of the same when to the benefit of the residuary legatee.

“Fourth. At the decease of my wife, I direct that my executors shall pay to the trustees of the Reformed Church at Tappan, the sum of \$500 on the condition that the said trustees shall keep forever my family burial plot in good order, and if there is no monument, and fence around the plot, at the time of the death of my wife, I direct that the sum of \$1,000 shall be retained from the residuary estate to procure and set up said monument with the proper inscription and erect said fence; then all the rest, residue and remainder of my said estate, I give, devise and bequeath to Jennie M. Knapp, the wife of George A. Knapp, forever, the same to be given her at the earliest opportunity after the death of my wife.”

The personal property was appraised at the sum of \$3,149.87. This amount was somewhat augmented by the addition of interest which subsequently accrued upon certain savings bank accounts. There remained of the personal property, after the legacy of \$1,000, and the debts, funeral and testamentary expenses were paid, the sum of \$1,301.75. This amount the executors accounted for and paid to the widow, as the residuum of the personal property, under the third item of the will. The residuary estate, therefore, consisted solely of real property, the use and benefit of which were given to the widow during her lifetime, with the privilege of selling the whole, or any part thereof, provided such sale would benefit the residuary devisee. This conditional power of sale was never exercised.

The widow, at her own expense, procured and placed a monument, suitably inscribed, in the family burial plot, and enclosed the plot with a fence, and the residuary estate was thereby re-

lieved of that charge. The widow, also, by an instrument in writing, released to the residuary devisee her life interest in the real property, of which the residuary estate was composed.

The widow died September 26, 1914. The payment to the trustees of the Reformed Church, at Tappan, of the sum of \$500 which the executors are directed to make, upon the widow's death, for the care, in perpetuity, of the family burial plot, has not been made. The trustees have requested such payment, and have signified their willingness to comply with the condition upon which it was to be made.

The particular question which I am asked to determine is, whether or not the amount payable to the trustees of the Reformed Church, upon the widow's death, is a charge upon the real property which comprises the residuary estate.

It is quite evident, as it appears to me, that the testator intended, although there is no express declaration to that effect, that the residue of his real property, after the widow's death, should constitute the fund out of which said amount should be paid, as well as the amount to be expended for the monument and fence, if, upon the widow's death, the executors found it necessary to make that expenditure.

It will be observed that by the third item of the will the testator gave to his wife, absolutely, all of his personal property, except the legacy of \$1,000. The gift was, in reality, subject to the payment of debts, funeral and testamentary expenses, and the payment of these charges so depleted the personal estate that the widow actually received but \$1,301.75.

The personal property was fully administered and applied, in accordance with the terms and provisions of the will, prior to the widow's death, so that when that event occurred the executors had no personal assets in hand out of which they could make the payment in question. Moreover, by the very terms of the will, the personalty is relieved of the payment, for in no event is it to be made until the widow's death. The only

property then available was the real property, which, in the fourth item of the will, is devised to the petitioner.

The intention of the testator to make the payment a charge upon his real property is, I think, clearly to be inferred from the language of the fourth item. The executors are therein directed, after the widow's death, to make the payment of \$500 and, contingently, to retain from the residuary estate and expend the further sum of \$1,000 for a monument and fence, and then follow these words: "then all the rest, residue and remainder of my said estate I give, devise and bequeath to Jennie M. Knapp, wife of George A. Knapp, forever." This implies that the residuary devisee should take what remains of the property, after one or both of the payments are made, as the case may be. Inasmuch, therefore, as the property consists of realty, the amounts which the executors are directed to pay constitute, in my opinion, an implied charge thereon.

It is a well-settled rule that legacies may be charged upon real estate without express direction in the will, if the intention of the testator so to do can be fairly gathered from all the provisions of the will; and that extraneous circumstances may be considered in aid of the terms of the will. (*Hoyt v. Hoyt*, 85 N. Y. 142; *McCorn v. McCorn*, 100 id. 511.)

Whether a legacy is made a charge upon the testator's real property is always a question of intention; and we must seek for and ascertain that intention in construing the will under consideration. Primarily, the language of the will is the basis of the inquiry, but, where the language is ambiguous or doubtful, extrinsic facts and circumstances which aid in the interpretation of the language employed, and help to disclose the actual intention, must be considered. (*Williams v. Jones*, 166 N. Y. 522-533.)

It is especially true that the court in the interpretation of the residuary clause will look not only at the language employed, but at the surrounding circumstances, to discover what

the intention of the testator was. (*Kerr v. Dougherty*, 79 N. Y. 327.)

In *Johnson v. Brasington* (156 N. Y. 181, 185), Mr. Justice O'BRIEN, writing the opinion, says: "When we speak in such cases of the intention of the testator, * * * We mean that when he has expressed himself in ambiguous or doubtful language that the law will impute to his words such a meaning as, under all the circumstances, will conform to his probable intention and be most agreeable to reason and justice." (*Riker v. Gwynne*, 201 N. Y. 143.)

It is a well established rule of construction that the court may not make a new will to carry out some supposed, but undisclosed, purpose, but shall first ascertain what the testator actually intended by the language employed, when properly interpreted, and then determine whether such intended provisions are valid or otherwise; and, if valid, give effect to the general scheme and purpose of the will. The court may interpret and construe; but it cannot make a new will. (*Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86.)

The testator's purpose was to give his wife absolutely, the whole of his personal estate, after payment of the legacy of \$1,000 and the debts, funeral and testamentary expenses; and, also, the beneficial use and enjoyment, during the term of her natural life, of his real property not specifically devised, without depletion or charge. He knew that, upon the death of his wife, when his executors would be called upon to make the payment of \$500, and the expenditure of \$1,000 for a monument and fence, they would have no personal assets in hand, and, therefore, it is fair to assume that he intended to charge the payment of these amounts upon the real property, not specifically devised, and of which his residuary estate was composed. (*Ely v. Ely*, 163 App. Div. 320, 336.)

In *McCorn v. McCorn* (100 N. Y. 511), which was an action to have a legacy adjudged to be a charge upon the real

estate, Mr. Justice Finch said: "His personal estate was insufficient even to pay his funeral expenses, and the two legacies to the widow and son were mere mockeries unless meant to be a charge upon the real estate. The testator must have known that he had no personal estate with which to pay the smallest portion of his bequests, and unless he meant to charge them upon the land we must impute to him the deliberate and conscious intention of making bequests to his wife and son which he knew could never be paid, * * * the situation is such that all possibility of innocent mistake is removed, and the facts drive us to the alternative of believing that the testator in making his last will, under the solemnity of approaching death, indulged in bequests known to be useless and vain, or meant that they should be paid from the only possible source. No reasonable intelligence can hesitate to draw the latter inference."

In *Irwin v. Teller* (188 N. Y. 25), there was a finding by the trial court that the testator left no personal property. The court said: "Starting out with these findings, the conclusion follows under the settled law of this State that these legacies are a charge upon the real estate of the plaintiffs devised to them by the testator." (See, also, *Brill v. Wright*, 112 N. Y. 129, and *Briggs v. Carroll*, 117 id. 288.)

In *Richardson v. Richardson* (145 App. Div. 540), Mr. Justice RICH says: "The testator knew when he executed his will that his personal property was insufficient to pay even the amount he had determined his executors should receive for their services, and it is not to be presumed that he intended to prefer the corporations to the exclusion of his own kindred, and it is noticeable that he disposed of both his real and personal property as a whole and without making any distinction between real and personal property. I think it was the intent of the testator that his real and personal property together were to furnish the fund out of which the legacies were to be paid.

The deficiency existed at the time the will was executed; it is so large and so obvious as to preclude any possible inference that the testator did not know and realize it, and it must be held that the legacies are a charge upon the real property of the decedent." (Citing *McCorn v. McCorn*, *supra*; *Briggs v. Carroll*, *supra*; *Irwin v. Teller*, *supra*; *Hogan v. Kavanaugh*, 138 N. Y. 417; *McManus v. McManus*, 179 id. 338.)

It follows from what has been said that the legacy of \$500 bequeathed to the trustees of the Reformed Church became and is a charge upon the real property devised to the petitioner in and by the fourth clause of the will.

A decree, in accordance herewith, may be entered herein upon the usual notice.

Decreed accordingly.

Matter of the Application for a Construction of the Last Will
and Testament of LINDA WERLE.

(*Surrogate's Court, Bronx County, July, 1915.*)

WILLS—CONSTRUCTION OF—WHEN REQUEST NOT SPECIFIC—CODE CIV. PRO.,
§ 2615.

The first paragraph of a will bequeathed "fifteen shares of American Car and Foundry Preferred Stock, and twelve shares of United States Steel Common," and the second paragraph, "any money remaining to my credit in the Bank of Savings, in the City of New York, and my gold watch and chain and bracelet with fifteen gold dollars attached," to legatees named.

It appeared that the testatrix left only \$225, in addition to the property bequeathed in said paragraphs of her will, which sum was not sufficient to pay debts, funeral and testamentary expenses.

In a proceeding for the construction of said will under section 2615 of the Code of Civil Procedure, *held*: That the bequest made by the first paragraph is not a specific but a general legacy, and that the bequest of

money in the Bank of Savings made by the second paragraph is a specific legacy.

That the second paragraph is not in effect a residuary clause.

That the property bequeathed by the first paragraph must be applied to the payment of debts, funeral and testamentary expenses, if these exceed the sum of \$225, before the property specifically bequeathed by the second paragraph can be applied to such purposes.

PROCEEDINGS under section 2615, Code of Civil Procedure, for the construction of a will.

John McKinlay Wight, for petitioner.

George Harrison McAdam, for respondent Marion K. Hawes.

SCHULZ, S.— This is a proceeding brought upon the petition of the executor named in the last will and testament of the decedent to obtain a construction of the latter's last will and testament pursuant to the provisions of section 2615 of the Code of Civil Procedure. The particular portion of the will as to which he requests the determination of the court is contained in paragraphs "First" and "Second" thereof.

Paragraph "First" is as follows:

"*First.* After my lawful debts are paid, I give and bequeath to Mrs. Marion K. Hawes, of Lyndhurst, in the State of New Jersey, fifteen shares of American Car and Foundry Preferred Stock, and twelve shares of United States Steel, common."

Paragraph "Second" is as follows:

"*Second.* I give and bequeath to my Niece, Mrs. Eliza W. Oliver, of Lincoln, Nebraska, any money remaining to my credit in the Bank of Savings, in the City of New York, and my gold watch and chain and bracelet with fifteen gold dollars attached."

The petition shows that at the time of the death of the decedent her property consisted of the money remaining to her credit in the "Bank of Savings" in the city of New York amounting to eight hundred dollars, fifteen shares of the American Car and Foundry Preferred stock, and twelve shares of the common stock of the United States Steel Corporation; and that she had no other property than that specifically mentioned in said will except the sum of two hundred and twenty-five dollars in cash in her personal possession, which latter sum was insufficient to pay her debts, funeral and administration expenses. These allegations of the petition are not denied and must therefore be accepted as true. (Code Civ. Pro., § 2546.)

The questions which the petitioner desires to have determined are:

(1) Is the legacy contained in the first paragraph a specific or a general legacy?

(2) Is the legacy contained in the second paragraph of said will, to wit, "money remaining to my credit in the Bank of Savings, in the City of New York," a specific or a general legacy?

(3) To what fund or property must petitioner have recourse for the payment of debts, funeral and testamentary expenses of the decedent remaining unpaid after the application thereto as part payment thereof of said sum of two hundred and twenty-five dollars cash in the personal possession of the decedent at the time of her death?

Roper on Legacies (page *191) defines a specific legacy as follows: "The bequest of a particular thing or money specified and distinguished from all others of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor," and he remarks: "It differs from a general or pecuniary legacy in this respect, that if there be a deficiency of assets, the specific legacy will not be liable to

abate with the general legacies; and on the other hand, if such specific legacy be disappointed, as by failure of the specific fund, the legatee will not be entitled to any recompense or satisfaction out of the personal estate of the testator."

Schouler on Wills and Administration (p. 521) defines a general legacy as being "one which does not necessitate delivering any particular thing or paying money out of any particular portion of the estate," and a specific legacy as being "the converse of this; or where a particular thing must be delivered, according to the terms of the bequest, or money paid out of some particular portion of the estate," and states that "One important consequence of this distinction is, that, should the assets prove deficient, general legacies must abate, while a specific legacy does not" (except for creditors as a last resort).

Thomas on the Laws of Estates Created by Wills (p. 1494) defines a legacy and says: "A legacy is general and not specific, unless by its terms it indicates a particular part of the testator's estate as the subject of the bequest."

In *Matter of King* (122 App. Div. 354), the court says: "A legacy is general when it is so given as not to amount to a bequest of a particular thing distinguished from all others of the same kind."

In the light of these definitions there can be no doubt that the legacy of the shares of stock in paragraph "First" is a general legacy, unless something in the language of that paragraph and the circumstances of the testator's estate indicate that the testatrix intended the shares which she possessed to be the identical shares which she bequeathed to the beneficiary named. The fact that at the time of her death she actually owned the identical number of shares in the respective corporations which she bequeathed to the beneficiary it is urged manifest such an intention. The question is not a new one and I believe is no longer debatable.

In the case of *Tift v. Porter* (8 N. Y. 516), the testator

owned three hundred and sixty shares of Cayuga County Bank stock and by his will he bequeathed 240 shares of Cayuga county Bank stock to one legatee and 120 shares to another but without indicating that the shares bequeathed were to be taken from those which he owned at the time of his death. The court adjudged that these legacies were not specific, and says in those cases in which legacies of stocks or shares of public funds have been held to be specific, "Some expression has been found from which an intention to make the bequest of the particular shares of stock could be inferred. Where, for instance, the testator has used such language as, 'my shares,' or any other equivalent designation, it has been held sufficient. But the mere possession by the testator, at the date of his will of stock of equal or larger amount than the legacy, will not of itself make the bequest specific." (Citing *Williams Executors*, 842; *Roper on Legacies*, 2067. See, also, *Shether v. Sherman*, 65 How. Pr. 9; *Holt v. Jex*, 48 Hun, 528; *Matter of King*, *supra*; *Spencer v. Hay Library Assn.*, 36 Misc. Rep. 395; *Matter of Bergen*, 56 id. 92; *Osborne v. McAlpine*, 4 Redf. 1.)

In my opinion it follows from the foregoing authorities that the bequest contained in paragraph "First" of the last will and testament under consideration is not a specific legacy but a general legacy.

As to the legacy contained in paragraph "Second" concerning which the executors appear in doubt, it is argued that the bequest of the "money remaining to my credit in the Bank of Savings, in the city of New York" is not a specific legacy for the reason that during the life of the testatrix she drew moneys from this bank, and that hence the amount on deposit at the time of her death was uncertain. The question whether a legacy is specific or general, however, does not depend upon the amount or even upon the certainty of the amount as is evident from the definitions heretofore set forth.

In *Larkin v. Salmon* (3 Dem. 270), the testatrix bequeathed

to beneficiaries named "all the money left in the West Side Bank, after carrying out the directions in the first three clauses of this my will." In the first three clauses of her will she had provided for paying two legacies of \$1,000 each, and also for fencing a plot in Calvary Cemetery, so that the amount which would remain in the West Side Bank was also uncertain. The learned surrogate held that the legacy in question was a specific legacy, "Within the definition of that expression sanctioned by the highest judicial tribunals" and cites numerous cases. In *Estate of Beckett* (15 N. Y. State Repr. 716), the bequest was of all the money that the testator died possessed of in savings banks, and here also the legacy was held to be specific.

Nor can I see any weight in the contention that the testatrix intended by the bequest under consideration to dispose of the remainder of her estate, and that the clause was in effect a residuary clause. It is conceded that she had the sum of \$225 in her personal possession and undisposed of by the will. These facts alone, in my opinion, show that the testator did not intend that paragraph "Second" should have the effect of a residuary clause. I hold that the legacy in question is a specific legacy.

A determination of the first two questions propounded on this construction, it seems to me, is an answer to the third.

Section 2684 of the Code of Civil Procedure so far as material provides that "Articles not necessary for the support and subsistence of the family of the deceased, or not specifically bequeathed, must be first sold; and articles so bequeathed must not be sold until the residue of the personal estate has been applied to the payment of debts."

It follows in the estate under consideration that the property which is the subject of the general legacy contained in paragraph "First" of the will must be applied to the payment of debts and of funeral and testamentary expenses, if they exceed the sum of \$225, before the application thereto of the property

mentioned in the specific legacy contained in paragraph "Second" thereof.

I construe the will in accordance with the above conclusions. Settle decree accordingly.

Decreed accordingly.

NOTE ON CONDITIONED LEGACIES.

CONDITIONS UPHELD BY THE COURTS.

The testator may impose any conditions that he pleases so long as they are not contrary to public policy or otherwise illegal, such as that an absent beneficiary on return within a certain time. (*Conner v. Sheridan*, 116 Wis. 666.)

That a legatee bury the testatrix in a certain cemetery. (*Matter of Barrett*, 10 Misc. 491.)

That the beneficiary should be in the testator's employ at the time of his decease. (*White v. Massachusetts Inst. of Tech.*, 171 Mass. 84.)

That in the case of a legacy to a church a certain minister should remain for a certain time. (*Caw v. Robertson*, 5 N. Y. 125.)

That a certain vestment should be worn in church service. (*In re Robinson*, 1 Ch. 95. See also *Dundee v. Dundee*, 4 Macq. 228.)

That in the case of a devise of a building to be used for the purposes of a library, the name of the testator should be engraved on a marble slab to be placed and kept over the main entrance. (*Jones v. Habersham*, 107 U. S. 174.)

That children should be reconciled with their mother. (*Page v. Frazer*, 14 Bush [Ky.] 205.)

That the legatee, a charitable society, should undertake in writing to the executors to have certain vaults in a cemetery painted periodically. (*Roche v. M'Dermitt*, [1901] Ir. 394.)

That a partnership should be formed. (*McCallum v. Riddell*, 23 Ont. 537.)

That the devisee or legatee should make a will in favor of a certain person. (*In re Turner*, 4 Ont. L. Rep. 578.)

That the money bequeathed should be needed by reason of sickness or misfortune. (*Garvey v. Garvey*, 150 Mass. 185, 22 N. E. 889.)

A will may limit the time when the legatee shall have an absolute interest, as on majority or otherwise. (*Calvert v. Boullemet*, 46 La. Ann. 1132, 15 So. 363.)

And it may make a legacy or devise dependent upon the condition of the estate. (*Kirkman v. Mason*, 17 Ala. 134.)

A will may make a legacy or devise dependent upon the birth of certain heirs. (*McMasters v. Shellito*, 14 Pa. Super. Ct. 303; *In re Burrows*, 2 Ch. 497.)

A will may make a legacy or devise dependent upon failure or issue. (*Crawford v. Clark*, 110 Ga. 729.)

A will may make a legacy or devise dependent upon the death of certain persons. (*Williams v. Jones*, 166 N. Y. 522.)

A will may make a legacy or devise dependent upon claim by the beneficiary. (*Stover's Appeal*, 77 Pa. St. 282.)

A condition that a legatee shall assist to defend a certain lawsuit against the testator is not void where the will shows upon its face that he believed the suit to have been brought without cause. (*Cannon v. Apperson*, 14 Lea [Tenn.] 553.)

A conditional legacy to a person on condition that he or she shall not marry is legal. (*Hogan v. Curtin*, 188 N. Y. 162, 42 Am. Rep. 244; *Merri-man v. Wolcott*, 61 How. Pr. 377.)

Such as a condition a devisee shall not marry a man below her in social position. (*Greene v. Kirkwood*, 1 Ir. 130.)

That she shall not marry into a certain family. (*Phillips v. Ferguson*, 85 Va. 509.)

That she shall not marry until a certain age, as twenty-one. (*Collier v. Slaughter*, 20 Ala. 263. See *Onderdonk v. Onderdonk*, 127 N. Y. 196, 27 N. E. 839.)

Or she shall not marry without the consent of those interested in the devisee or legatee's welfare. (*Collier v. Slaughter*, 20 Ala. 263, 27 N. Y. 196.)

The beneficiary may be required to remain single for a certain time only. (*Densfield, Petitioner*, 156 Mass. 265.)

It has been held that a gift to hold, "So long as she shall remain unmarried" is valid. (*Mann v. Jackson*, 84 Me. 400, 24 Atl. 886; *Harlow v. Bailey*, 189 Mass. 208, 75 N. E. 259; *Morgan v. Morgan*, 41 N. J. Eq. 235, 3 Atl. 63; *In re Holbrook*, 213 Pa. St. 93.)

A gift intending to provide for the legatee while single may contain a valid condition against marriage. (*Harlow v. Bailey*, 189 Mass. 208.)

A will providing for the support of daughters as long as they remain single and need support is valid. (*Trenton Trust Co. v. Armstrong*, 70 N. J. Eq. 572.)

And devises of real estate may be limited in duration by the marriage of the devisee. (*Mann v. Jackson*, 84 Me. 400; *Com. v. Stauffer*, 10 Pa. St. 350.)

A testator may devise certain property to one of his children, and pro-

vide that, if the child should die without having married, the property should go to another. (*Sullivan v. Garesche*, 229 Mo. 496.)

Or he may make a devise or bequeath to a person only in the event of his or her marriage. (*McClelland v. McClelland*, 132 Ky. 234.)

Conditions against the remarriage of the testator's widow are valid. (*Chapin v. Cooke*, 73 Conn. 72; *Chapin v. Marvin*, 12 Wend. 538.)

That the legatee shall not forsake the Jewish religion or marry a Christian. (*Laurence v. McQuarrie*, 26 Nova Scotia, 164; *contra*, *Maddox v. Maddox*, 11 Gratt. [Va.] 804.)

A devise or bequest may be conditional on pursuing a certain trade or occupation. (*Seeley v. Hincks*, 65 Conn. 1.)

A condition held valid that a legatee or devisee educate his children in a particular religious faith. (*Magee v. O'Neill*, 19 S. C. 170.)

A condition that beneficiary should withdraw from the priesthood in the Roman Catholic Church or membership in an order or society connected with such church, held valid. (*Barnum v. Baltimore*, 62 Me. 275.)

A condition that testator's daughter could not unite herself to any religious sisterhood or remain attached to such sisterhood, held valid. (*Spencer v. See*, 5 Redf. Surr. [N. Y.] 542.)

A condition that a legatee should renounce the Roman Catholic priesthood held valid. (*Ex p. Dickson*, 1 Sim. N. S. 37.)

A codicil revoking the legacy to a testator's daughter if she should become a nun, held valid. (*Laurence v. McQuarrie*, 26 Nova Scotia, 164.)

A condition that a devisee or legatee should return or reside in a particular place held valid. (*Newkirk v. Newkirk*, 2 Cai. 345.)

Condition that a married woman should not reside where her husband lived was held valid as obliging her to live separate. (*Wilkinson v. Wilkinson*, L. R. 12 Eq. 604.)

Condition that beneficiary shall be baptized with, or that he shall adopt and assume a certain name are valid. (*Matter of Jackson*, 20 N. Y. Suppl. 380.)

Condition that the beneficiary should show to the judge's satisfaction that he is a reformed man, held valid. (*Cassem v. Kennedy*, 147 Ill. 660.)

Or that he shall ceased to be a spendthrift for a certain time. (*Burnham v. Burnham*, 79 Wis. 557.)

Condition that he shall abstain from the use of intoxicating liquors and tobacco and association with immoral persons, held valid. (*Onderdonk v. Onderdonk*, 127 N. Y. 196.)

A condition that he shall totally abstain from intoxicating liquors and card playing, held valid. (*Jordan v. Dunn*, 13 Ont. 267.)

A condition that a girl who has lived with testator shall remain in his family and conduct herself as she has heretofore done until she reaches a certain age, held valid. (*Reuff v. Coleman*, 30 W. Va. 171.)

A gift over to a child in case her father becomes a drunkard or a vagabond, held valid. (*Forsyth v. Forsyth*, 46 N. J. Eq. 400, 19 Atl. 119.)

A condition that the beneficiary shall pay certain debts or sums of money to another, held valid. (*Monjo v. Woodhouse*, 185 N. Y. 295; *Scott v. Cramer*, 31 Ohio St. 295; *Sherman v. American Cong. Assoc.* 113 Fed. 609.)

And the same is true on conditions against the remarriage of a widower. (*Stivers v. Gardner*, 88 Iowa, 307.)

A son may impose the condition as to the remarriage of his mother or a parent as to a child. (*In re Hotz*, 38 Pa. St. 422; *contra*, *Crawford v. Thompson*, 91 Ind. 266.)

A devise or legacy made to induce a future separation or divorce of husband and wife is void as against public policy and it takes effect absolutely. (*Matter of Haight*, 51 N. Y. App. Div. 310.)

A devise or bequeath may be so formed as to provide for one in case of separation or divorce. (*Wright v. Mayer*, 47 N. Y. App. Div. 604.)

A bequest providing for the support of a wife pending a present or contemplated separation from her husband has been held valid. (*Witherspoon v. Brokaw*, 85 Mo. App. 169.)

Property left in trust for a married daughter to become hers absolutely in event of her widowhood the provision was held valid. (*Rittenhouse v. Hicks*, 10 Ohio Dec. 759.)

A condition that the father shall not resume his relations as custodian of his child held void. (*Witherspoon v. Brokaw*, 85 Mo. App. 169.)

A devise to an infant as to condition that he shall within a certain time go to live with testator's sister as her own son and remain under her sole guidance and guardianship until of full age is valid. (*Johnson v. Warren*, 74 Mich. 491.)

A condition in a will that a gift shall be void in case the beneficiary shall dispute the will is valid. (*Bryant v. Thompson*, 59 Hun, 545.)

It has been held that such conditions are not operative as against infants. (*Bryant v. Thompson*, 59 Hun, 545.)

A condition that any devisee who shall contest the will shall pay the expenses of both sides is valid, without limitation over. (*Kayhart v. Whitehead*, 77 N. J. Eq. 12.)

A condition that the beneficiary shall make no claim against testator's estate is valid. (*In re Morey*, 1 N. Y. Suppl. 687.)

A limitation in unmistakable terms that the estate shall cease upon the insolvency of the beneficiary may be valid, even without a limitation over. (*Rochford v. Hackman*, 9 Hare, 475.)

A devise or bequest may be conditioned upon the beneficiary pursuing particular lines of study or possessing a certain education. (*Shepard v. Shepard*, 57 Conn. 23, 17 Atl. 173.)

Or his membership in a particular religious body or attendance at a particular church. (*Magee v. Oneill*, 19 S. C. 170.)

A condition held valid, that a devisee shall have the land as long as he

pays the taxes upon it, with limitation over. (*Hoselton v. Hoselton*, 166 Mo. 182.)

Gifts conditioned on the beneficiary's rendering services or furnishing support or maintenance to another are held valid. (*Matter of Tinsdale*, 110 N. Y. App. Div. 857.)

CONDITIONS NOT UPHELD BY THE COURTS.

Conditional legacies or bequests are void if they are opposed to public policy or otherwise illegal—such as a clause in a will prohibiting the division of the estate between the cities of New Orleans or Baltimore or that slaves choose their masters. (*Osborne v. Taylor*, 12 Gratt. [Va.] 117.)

A condition in a will declaring that a testator is not indebted to any of his children who are legatees, and that if either of them so make a claim against the estate he shall not take anything under the will is unreasonable and invalid. (*Matter of Vandervort*, 62 Hun, 612.)

Matter of the Estate of CHARLES KOHLER, Deceased.

(*Surrogate's Court, New York County, August, 1915.*)

EXECUTORS AND ADMINISTRATORS—APPLICATION TO, FOR ADVANCEMENT TO LEGATEE—WHEN APPLICATION WILL BE DENIED.

An application for an advance payment on a legacy denied because (1) the moving papers do not show that the husband has not sufficient means to support and maintain the legatee; (2) it does not conclusively appear that the income which petitioner is receiving from the estate is insufficient for her support, and (3) there is no fund indefeasibly vested in her from which the advancement asked for can be made.

APPLICATION by a legatee under section 2691 of the Code of Civil Procedure for an advance payment on a legacy.

Henry C. Quinby, for petitioner.

Ellison & Ellison, for trustees.

Egerton L. Winthrop, Jr., special guardian.

FOWLER, S.— This is an application by a legatee under section 2691 of the Code for an advance payment on a legacy. The petitioner is twenty years of age, is married and has an infant child. She lives with her husband. Under the will of her father she receives an annual income of \$25,000, but she alleges in the petition that owing to unusual circumstances during the last year she needs an advance of \$25,000. The petition contains no allegations as to the ability or inability of the petitioner's husband to support her and their child.

The special guardian reports that the application should be granted, except that instead of charging the \$25,000 against the first installment of principal it should be charged against the

principal or income of the share to which the petitioner may be entitled under the eighteenth clause of the will.

There is no copy of the will attached to the papers. From the extracts contained in the report of the special guardian it appears that the residuary estate referred to in the 18th clause of the will is that which may remain after sufficient is set apart by the trustees to insure payment of the income of \$25,000 a year to each of the legatees and the installments of principal. To insure these payments may require the application of the entire estate, so that there would be no residuary under the 18th clause of the will. If there is no residuary, there is no fund from which the trustees may advance the sum of \$25,000. It seems to me, therefore, that the application should be denied for the following reasons: *First*. Because the moving papers do not show that the husband of the petitioner has not sufficient means to support and maintain her. *Second*. It does not conclusively appear that the income of \$25,000 a year which the petitioner is now receiving from the decedent's estate is insufficient for her support. *Third*. Because there is no fund indefeasibly vested in the petitioner out of which the advancement of \$25,000 could be made.

Decreed accordingly.

Matter of the Estate of MAGDALENA HERRMANN, Deceased.*

(*Surrogate's Court, New York County, August, 1915.*)

WILLS—WHEN PROBATE PROCEEDING DOES NOT ABATE—DECREE ADMITTING WILL TO PROBATE—JURISDICTION OF COURT.

A probate proceeding does not abate by reason of the death of any of the heirs at law and next of kin of decedent before the entry of the decree

* See 87 Misc. Rep. 476.—[REP.]

admitting the will to probate and such decree binds the personal representatives who voluntarily appeared in the proceeding and submitted to the jurisdiction of the court.

PROCEEDING upon the probate of a will.

Gustav Goodman, for the motion.

John B. Quintin (James W. Osborne, of counsel), opposed.

FOWLER, S.— This is an application by the proponent to set aside the decision heretofore rendered and the decree entered thereon in the proceedings brought to probate a paper purporting to be the last will and testament of the decedent. The decision was filed on the 22d of November, 1914, and the amended decree was entered on the 16th of March, 1915. George Herrmann, one of the heirs at law and next of kin of the decedent, and the only one who filed objections to the probate, died after the trial, but before the decision of the court was filed. Edward Herrmann, who was an heir at law and next of kin, died before the filing of the decision. Subsequently to the date upon which the decision was filed, but before the entry of the decree, the personal representatives of Edward Herrmann and George Herrmann voluntarily appeared in the proceeding and filed a notice of appearance in accordance with the rules and practice of this court. A decree was entered on March 9, 1915, in accordance with the decision of the court, and this decree recited the death of Edward Herrmann and George Herrmann during the pendency of the proceeding and the appearance of their personal representatives. This decree was subsequently amended upon the motion of the attorneys for the proponents, but no objection was made on the ground that the representatives of the deceased heirs at law and next of kin were not brought in by order of the court.

A probate proceeding does not abate because of the death of the contestant or the executor or any of the next of kin; the surrogate must take proof and determine whether the paper purporting to be the last will and testament of the decedent is entitled to probate. (*Van Alen v. Hewins*, 5 Hun, 44.) Therefore the proceeding to probate the paper purporting to be the last will and testament of Magdalena Herrmann did not abate because of the death of Edward Herrmann and George Herrman before the entry of the decree. As their personal representatives voluntarily appeared in the proceeding and submitted themselves to the jurisdiction of the court, the decree of the court is binding upon them. (*Brick v. Brick*, 66 N. Y. 144.) All the parties having been before the court at the time the decree was entered the surrogate had jurisdiction to make the decree denying probate to the paper propounded as the last will and testament of the decedent. The application of the proponent to vacate the decree is therefore denied.

Application denied.

Matter of the Estate of MARY C. LEARY, Deceased.

(*Surrogate's Court, New York County, August, 1915.*)

**WILLS—CONSTRUCTION OF—CONDITIONAL REQUESTS AS TO PAYMENT OF DEBTS
—PETITION MADE UNDER SECTION 2615 OF CODE OF CIVIL PROCEDURE—
WHEN PETITION DENIED.**

Where a petition made under section 2615 of the Code of Civil Procedure for the construction of a will by the son of testatrix to whom bequests were made on condition that he pay the debts of testatrix within a year after her decease alleges that it will be practically impossible for him to comply with the condition and asks that the limitation of one year be eliminated the application will be denied as any construction of the will based on the assumption that petitioner will not comply with said condition would not only be premature but speculative and impractical.

APPLICATION for the construction of a will under section 2615 of the Code of Civil Procedure.

Armstrong, Brown & Purdy (Pierre M. Brown of counsel),
for petitioner.

Haight, Sandford & Smith, for Marie C. Lowe.

FOWLER, S.—This is an application for a construction of paragraph sixth of the codicil to the last will and testament of the testatrix. The application is made under section 2615 of the Code. The paragraph referred to reads as follows:

“Sixth. The provisions made for my son, Daniel J. Leary, by the second paragraph of my said will and the fifth paragraph of this codicil are made upon condition that my said son, Daniel J. Leary, shall have paid to me prior to my death or shall have paid to my executor within one year after my decease, all moneys owing by him to me, whether individually or as the liquidating member of any copartnership in which he and I, whether alone or with another, were partners; and if said moneys so due to me shall not have been paid to me or to my executor, as aforesaid, then said devise and bequest shall become null and void and the property so devised and bequeathed to my said son shall become part of my residuary estate.”

The testatrix died on August 3, 1914, and her will was admitted to probate by this court on the 17th of September, 1914. The executor has not yet filed an account of his proceedings. The petitioner, Daniel J. Leary, alleges that it will be practically impossible for him to comply with the conditions mentioned in the codicil, and he asks the court to hold that the limitation of one year is inoperative and that it should be eliminated from the codicil. If the petitioner before the 3d of August, 1915, makes the payments mentioned and described in the codicil, he will be entitled to the legacies given to him

in the will of the testatrix, and no construction of the provisions of the will or codicil will be necessary to determine his right to such legacies. Until that time arrives it cannot be said as a matter of law that he will not comply with the conditions mentioned in the codicil. Therefore any construction of the will based upon the assumption that the legatee will not comply with the conditions mentioned in the codicil would be not only premature, but would be speculative and impractical. It is not the intent of section 2615 of the Code that the surrogate shall construe a will merely for the purpose of relieving his opinion of the effect of testamentary dispositions of property under circumstances which may never arise or contingencies which may never happen. It is reasonable to assume that the petitioner will endeavor to comply with the conditions mentioned in the codicil, and any decision which the court might now make in construing the will could be of no assistance to him in his efforts to effect such a compliance. A construction would be entirely unnecessary if he should comply with the conditions of the codicil; it would be ineffective and inapplicable if based upon the assumption that the legatee will not comply with the conditions unless it should take into consideration facts which are not now before the court and which cannot be before the court until the executor files his account. This the surrogate should not do. The application for a construction of the will at the present time is therefore denied.

Application denied.

Matter of the Estate of BENJAMIN BURGHEIMER, Deceased.

(*Surrogate's Court, New York County, August, 1915.*)

WILLS—CLAUSE IN, AS TO GOOD-WILL OF BUSINESS—TRANSFER TAX.*

Where as the result of an oral agreement between testator and his brother, who was his partner in business, that in the event of either dying nothing should be paid by the survivor for the good-will or firm name, and that the last will of each partner should contain such a provision, a clause in testator's will that his death should not dissolve the partnership and that the extent of his interest in the firm should be determined within a certain time and nothing paid by his estate for the good-will or firm name does not justify a finding in a proceeding to fix a transfer tax that the good-will of the firm had no existence; the testator could not by his will reduce to nothing a substantial asset of his estate and thus escape its proper taxation.

APPEAL from an order fixing the transfer of tax.

Lafayette B. Gleason (Schuyler C. Carlton and Alexander Otis of counsel), for state comptroller.

Otto A. Samuels (Ralph H. Blum of counsel), for respondent.

FOWLER, S.—The decedent died October 8, 1913. His will contained this provision: "In case I am a member of the copartnership firm of B. & J. Burgheimer, then it is my will and intention that said copartnership shall not be dissolved by my demise, but that the surviving member of that firm shall continue the business until the following July 1 or January 1, whichever day first arrives, when stock shall be taken in the same manner as we have been accustomed to take stock, and the amount of my interest determined, but nothing shall be paid by my estate for the good will or firm name."

* See note, Vol. 3, p. 392.

The transfer tax appraiser's finding was that decedent had no good will as a partner in said firm, and an order was entered confirming the appraiser's report. The state comptroller appeals from said report and order because of this finding, and on the further ground that the said good will was not worth less than \$25,000. The testimony shows that decedent and his partner, who was his brother, had orally agreed that in the event of either dying nothing should be paid by the survivor for the good will or firm name of said business, and in addition it was agreed that wills should be made by each partner containing this provision. It is claimed this agreement was carried out and the wills made. It should be noted that the will which it was stated was made by the surviving partner was not introduced in evidence. The clause in decedent's will above set forth, it is claimed, is a result of that agreement, and that upon that clause it is evident that the appraiser based his finding that the good will of said firm had no existence. An agreement between partners as to the devolution of the good will of their business on the death of either does not prove that there is no "good will." Nor does it perhaps bind the State, not a party to the understanding. The transfer tax statute provides that property owned by a decedent at the time of his death is subject to a tax. This provision is subject to certain exemptions which do not apply in this particular case. Undoubtedly the decedent died owning an interest in the good-will and firm name of the copartnership above mentioned. Consequently the good-will formed a part of his estate as an asset. I fail to find any precedent by which testator, through the operation of his last will and testament, would be able to reduce to nothingness a substantial asset of his estate and thus escape its proper taxation. I have examined the authorities submitted by the respondent and do not think that they determine a legal finding different from that which I have expressed.

The value of the good-will and firm name does not appear

to have been very clearly developed before the appraiser. This question should be resubmitted to him for further testimony and report. The appeal is therefore sustained and the order heretofore entered should be vacated and the matter remitted to the transfer tax appraiser for the purpose of taking further testimony as to the value of the said good-will and firm name.

Settle order on notice sustaining appeal, vacating order fixing tax and remitting report to appraiser for the purpose of taking testimony as to the value of the good-will and firm name of the copartnership of which decedent had been a member.

Decreed accordingly.

Matter of the Estate of CAMILLA E. POLLOCK, Deceased.

(Surrogate's Court, New York County, August, 1915.)

WILLS—DEVISE AS TO CERTAIN REAL ESTATE FOR LIFE—LIABILITY OF EXECUTOR TO ACCOUNT FOR PROCEEDS PAID TO TESTATRIX AS LIFE TENANT—ACCOUNTING—EXECUTORS AND ADMINISTRATORS.

Where many years prior to the death of testatrix the proceeds of certain real estate devised to her by her husband for life were lent or given for investment by her to her executor, he is not liable to account for such proceeds as were paid to his testatrix as life tenant under the will of her husband; the executor should, however, account for moneys which belonged to testatrix individually and which she loaned and gave to him to invest.

HEARING of objections filed to the account of an executor and trustee.

Oliver E. Davis, for petitioner.

C. H. & J. A. Young (Albert Ritchie of counsel), for respondent.

FOWLER, S.—The executor and trustee under the will of the testatrix has filed an account of his proceedings, and objections thereto have been filed by the life tenant and the remainderman mentioned in her will. The objections relate to the proceeds of real estate devised by Julius Pollock to the testatrix for life. The testatrix was the widow of Julius Pollock.

It appears from the testimony already taken before me that the proceeds of this real estate were lent or given for investment by the testatrix to one Donald McLean, and it is contended that the executor and trustee of her estate should account in this proceeding for the money so loaned or invested.

Julius Pollock gave the "use and enjoyment" of his entire estate to the testatrix during her life, and directed that upon her death the income should be paid to his children until they arrived at the age of thirty years, when the principal was to be paid over to them. The only child of the testator who survived the life tenant is Donald Julius Pollock, and he is also remainderman under the will of the testatrix. The testatrix, as life tenant in possession of the property, was a trustee for the purpose of preserving the principal for the remainderman and of paying over to herself the income therefrom during her life. (*Leggett v. Stevens*, 185 N. Y. 70; *Seaward v. Davis*, 198 N. Y. 420.) Upon the death of the testatrix herein as trustee of the estate of Julius Pollock, deceased, the remainderman became entitled to the corpus of the trust fund bequeathed and devised by the will of Julius Pollock. The executor of the estate of testatrix is required to account to such remainderman for any part of the trust fund that came into his possession; and, so far as the trust fund may be proved to be in the hands of the testatrix at the time of her death, her executor would be compelled to account for it. (*Farmers' Loan & Trust Co. v. Pendleton*, 179 N. Y. 495.) But the executor of the deceased trustee is not liable to account for any of the trust funds that

did not come into his possession or under his control. (Matter of Hayden, 204 N. Y. 340.)

It is apparent from the papers filed on this application that the proceeds of the real estate which belonged to Julius Pollock and which constituted part of the trust fund in possession of testatrix as life tenant did not come into possession of Donald McLean as executor of the estate of testatrix. The moneys which were paid to the testatrix upon the the partition and foreclosure of the real estate were given by her to Donald McLean many years prior to her death. The property was not in her possession at the time of her death and did not come into the possession of her executor, therefore such executor is not liable to account for it in this proceeding.

The objections that have been filed to the account of the executor in relation to the proceeds of real estate paid to the testatrix as life tenant under the will of Julius Pollock are overruled. The executor should account for the moneys which belonged to the testatrix individually and which she loaned to him or gave to him for purposes of investment.

Decreed accordingly.

Matter of the Estate of JOHN H. SCHRIEVER, Deceased.

(*Surrogate's Court, Rockland County, September, 1915.*)

WILLS—EXECUTION OF—DRAWN BY INEXPERIENCED LAYMAN—CONSTRUCTION OF WILL—BEQUESTS—POWER OF SALE UNDER—CODE CIV. PRO., § 2615.

A will inartificially drawn by an inexperienced layman but duly executed and attested provided:

"*First.* After my lawful debts are paid, I give & bequeath to my wife the income of all my real & personal estate while she remains my widow, should she remarry I want my estate to be divided as follows, as written & mentioned on page 2 of this will. * * *

"I hereby appoint my son Henry J. Schriever of New York City to be executor of this my last will and testament, hereby revoking all former wills."

On page 2 appeared:

"To my widow whatever the law allows her, in lieu of dower, & remainder to be divided as hereafter mentioned.

"(1st) I bequeath to my wife & executor power to sell whatever real estate I may own at the time of my death if they deem it to advantage.

"(2d) I bequeath to my daughter Annie C. Fifty dollars, (\$50) my said daughter having married without my consent. I therefore give her the above small amount should my daughter die before the settlement of my will I bequeath said amount of (\$50) Fifty dollars to my son & executor.

"(3d) I bequeath to my nephew John H. Schriever son of my brother Herman in Attwistedt Germany the sum of Five thousand (\$5,000) dollars, if said nephew should die before my estate should be settled said sum of Five thousand (5,000) dollars should go to my son & executor.

"(4th) I bequeath to my Brother-in-law Diederick Hinck the sum of twenty five hundred (\$2500) dollars, should said Hinck die before the settlement of my will, said sum of twenty five hundred dollars I bequeath to my son & executor.

"(5th) The remainder of my real & personal estate whatever it may be, I will & bequeath to my son & executor, or his heirs forever, said sum to be regulated by the first clause of my said will & testament.

"I heretofore bequeathed to my daughter the sum of Fifty dollars said small bequest was on account of marrying without my consent & knowledge, the only notice received by me was the telegram sent by her husband annexed to this will."

In a proceeding brought under section 2615 of the Code of Civil Procedure by testator's daughter to obtain a judicial determination as to the validity, construction and effect of the above mentioned clauses of testator's will, while his widow was still living and unmarried, *held*:

That the testator has made a valid testamentary disposition of his entire estate;

That the executory bequests on page two are limited upon the widow's remarriage, and will not become effective unless and until that event occur;

That the estate in remainder, whatever it may be, whether it arise upon the widow's death unmarried, or upon her remarriage, will pass to the son absolutely, and without any qualification, but subject to the widow's right of dower in the real property;

That the widow, in the event of remarriage, will forfeit her right to the income from the estate; but will still have a right of dower in the real property; and

That the power of sale given to the widow, conjointly with the son, will terminate in the event of her remarriage, and that a decree should be entered accordingly.

PROCEEDING for construction of a will.

Patterson & Brinckerhoff, for petitioner.

Lewis M. Johnson (Frank Comesky of counsel), for executor and residuary legatee.

Frank W. Arnold, for legatee.

MCCAULEY, S.— This proceeding was brought in accordance with the provisions of section 2615 of the Code of Civil Procedure to obtain a judicial determination as to the validity, construction and effect of certain clauses of the last will and testament of John H. Schriever, deceased, which was admitted to probate by this court February 24, 1910. The will bears date and was executed May 23, 1899.

The testator died January 20, 1910, leaving an estate, consisting of real and personal property, valued at \$39,000. His wife, Katherine, survived him, and she is still living and unmarried. He left two children, Annie E. McElroy, a daughter, and, contingently, a legatee, by whom this proceeding was instituted, and Henry J. Schriever, a son, who is the residuary legatee and executor named in the will. These children are the testator's only heirs at law and next of kin.

The daughter's marriage without her father's consent and in opposition to his wishes hastened the preparation and execution of the will, and brought about her practical disinheritance. The testator, as if to emphasize his displeasure and disapproval of the marriage, and the influence which it exerted in the disposition of his estate, annexed to the will, at the time of its

execution, a telegram which he had received a few days before announcing the marriage.

The will, though inartificially drawn, was properly executed and attested. The draftsman whom the testator commissioned to prepare it was a layman, who, evidently, was without experience in the preparation of legal instruments. He used a printed form, filling in the material provisions of the will. These provisions are not expressed in apt or appropriate language, and are to some extent ambiguous, uncertain and doubtful. It may, in truth, be said that the draftsman not only failed to bestow upon his work the thought and care which it merited, but that he was negligent and careless in its performance. The printed form being on one page, and not affording sufficient space to enable the draftsman to write in all the testamentary provisions, the major portion of them was written on the back of the blank, each page being numbered. We omit the formal parts of the will and reproduce only the items which we are asked to construe.

"Page (1) one.

"First: After my lawful debts are paid, I give & bequeath to my wife the income of all my real & personal estate while she remains my widow, should she remarry I want my estate to be divided as follows, as written & mentioned on page 2 of this will. * * *

"I hereby appoint my son Henry J. Schriever of New York City to be executor of this my last will and testament. hereby revoking all former wills.

"Page (2) two.

"To my widow whatever the law allows her, in lieu of dower, & remainder to be divided as hereafter mentioned.

"(1st) I bequeath to my wife & executor power to sell whatever real estate I may own at the time of my death if they deem it to advantage.

"(2d) I bequeath to my daughter Annie C. Fifty dollars,

(\$50) my said daughter having married without my consent. I therefore give her the above small amount should my daughter die before the settlement of my will I bequeath said amount of (\$50) Fifty dollars to my son & executor.

“(3d) I bequeath to my nephew John H. Schriever son of my brother Herman in Attwistedt Germany the sum of Five thousand (\$5000) dollars, if said nephew should die before my estate should be settled said sum of Five thousand (5000) dollars should go to my son & executor.

“(4th) I bequeath to my Brother-in-law Diederick Hinck the sum of twenty five hundred (2500) dollars, should said Hinck die before the settlement of my will, said sum of twenty five hundred dollars I bequeath to my son & executor.

“(5th) The remainder of my real & personal estate whatever it may be, I will & bequeath to my son & executor, or his heirs forever, said sum to be regulated by the first clause of my said will & testament.

“I heretofore bequeathed to my daughter the sum of Fifty dollars said small bequest was on account of marrying without my consent & knowledge, the only notice received by me was the telegram sent by her husband annexed to this will.”

The widow, though cited, has not participated or appeared in the proceeding; and, apparently, is not interested in the controversy which has arisen between the son and daughter concerning the ultimate disposition of the estate.

The daughter's contention is that the executory bequests on page 2 are limited upon the widow's remarriage, and will not become effective unless and until that event occur; that, in the event of the widow's death, unmarried, the estate in remainder is not disposed of, and the testator must, in that event, be considered as having died intestate, and that she and her brother, as his heirs at law and next of kin, will take the remainder by inheritance, in equal shares.

The son, however, claims that the will, if reasonably and

properly construed, disposes of the testator's entire estate; and, therefore, that the bequests on page 2 become effective either upon the death or the remarriage of the widow. He argues that the provisions of the will, when read and construed together, evince an intention on the part of the testator to dispose of his entire estate, not only upon the remarriage of his wife, but also upon her death; and that the words "upon her death or," or words of equivalent meaning, were ignorantly or carelessly omitted from the clause which limits the widow's estate. He insists that these, or similar words, shall be supplied and inserted, in construing the clause referred to, in order that the actual intention of the testator be made effective, and not defeated.

Let us examine and analyze the various provisions of the will, omitting for the present, however, any reference to or discussion of the fifth item, being the residuary clause on page 2.

By the first clause the wife is given the income from the entire estate, real and personal, "while she remains my widow." The widow's interest in the estate must, therefore, terminate upon the happening of either one of two contingencies, namely, her death or remarriage.

This clause, it will be observed, in express terms disposes of the estate in remainder upon the widow's remarriage; but does not, either expressly or by implication, dispose of it upon the widow's death unmarried. The language of the clause is "should she remarry I want my estate to be divided as follows, as written and mentioned on page 2 of this will."

There is no ambiguity, doubt or uncertainty in the language of this provision; its meaning is clear.

The conclusion to be drawn from the language of this clause is that the executory bequests on page 2 are limited upon the widow's remarriage, and will not become effective unless that event occur; and that in the event of her death, unmarried, a

contingency for which no provision is made, the testator must be considered as having died intestate as to the estate in remainder, unless it passes to the son and residuary legatee under the fifth item.

The first paragraph on page 2, which must be read and construed in connection with and as if it were a part of the first item, which immediately precedes it, tends to show that the testator actually intended that the bequests which follow should depend upon the widow's remarriage, and not upon her death. The language of the paragraph is "To my widow whatever the law allows her, in lieu of dower, and *remainder to be divided as hereafter mentioned.*"

He could make no gift to the widow after death, and her right of dower would terminate upon the happening of that event. Nor do I find anything in the context which indicates a different purpose, unless it be the expression with which the will is closed. This declaration would seem to indicate that the gift to the daughter of fifty dollars was intended to be absolute; but it is not sufficient to override the preceding clauses in which, **as we have shown**, a different purpose is clearly expressed.

It may appear strange and unusual, if not, indeed, absurd, as counsel argues, that the bequests on page 2 should be made to depend solely upon the widow's remarriage; but the testator has so expressed himself, and his will is controlling. We may conjecture that through ignorance, oversight or carelessness on the part of the testator, or the draftsman of the will, a mistake has occurred and that a material provision has been omitted; but it is not within the power of this court to correct the mistake or supply the omission. We cannot do for the testator what he has failed to do for himself. We may interpret and construe, but we cannot make a new will, or import into the one under consideration a new provision.

Counsel argues that because of the obvious purpose of the testator to deprive his daughter of any share of his estate, save

the legacy of fifty dollars, we should read into the first item the words "upon her death or," or similar words, so that the bequests on page 2 shall become effective either upon the widow's death or remarriage. This in effect would amount to a revision or amendment of the will, which is not within the power of this court, and would not effectuate, but alter, the general scope and plan of the will. The views which I have expressed are in accord with the well-established rules of construction.

The rule is very tersely stated in *Herzog v. Title Guarantee & Trust Co.* (177 N. Y. 86-92), where the court says: "The duty of the court is not to make a new will or codicil to carry out some supposed but undisclosed purpose, but to ascertain what the testator actually intended by the language employed by him when properly interpreted, and then to determine whether such intended provisions are valid or otherwise. The duty of the court is to interpret, not to construct; to construe the will and codicil, not to make new ones." (*Tilden v. Green*, 130 N. Y. 29, 51.)

Where the real meaning and intent of a testator in his will appears clear, and its plain and definite purposes are endangered by inaccurate modes of expression, the language may be subordinated to the intention. In such case the court may reject words and limitations, supply or transpose them, to get at the correct meaning. (*Phillips v. Davies*, 92 N. Y. 199-204, and cases there cited.)

While courts have great latitude in giving effect to imperfectly expressed testamentary intentions, they have no right to make wills for testators. Although a will need not be framed in any particular or set phrase, it must at least be so plain as to furnish some tangible clue to the testator's intention. In cases where the language of wills has been inexact or ambiguous the courts have frequently transposed or inserted words or phrases, or even left out or inserted provisions in order to effectuate an intent that was with reasonable certainty to be

gathered from the context of the whole instruments. (Phillips v. Davies, *supra*; Pond v. Bergh, 10 Paige, 140.) Courts have no power, however, to construct a will where none has in fact been made, nor to import into a will new provisions which are designed to create a testamentary disposition which is neither expressed nor necessarily to be implied. (Dreyer v. Reisman, 202 N. Y. 476, 480, citing Wager v. Wager, 96 id. 164, 172.)

The rule is thus stated in Tilden v. Green (*supra*), page 51: "At the threshold of every suit for the construction of a will lies the rule that the court must give such construction to its provisions as will effectuate the general intent of the testator as expressed in the whole instrument. It may transpose words and phrases and read its provisions in an order different from that in which they appear in the instrument, insert or leave out provisions if necessary, *but only in aid of the testator's intent and purpose. Never to devise a new scheme or to make a new will.*" (See, also, Hulbert v. Southerland, 163 App. Div. 241; Eidt v. Eidt, 142 id. 733-737.)

The court in Eidt v. Eidt (*supra*), p. 737, says: "The rule laid down in Starr v. Starr (132 N. Y. 154) that 'in construing wills the court may transpose, reject or supply words so that it will express the intention of the testator,' does not extend so far as to allow the court to make a new will for the testator which will dispose of the property in a way not justified by any reasonable construction of the will." (Citing Matter of Disney, 118 App. Div. 378, 190 N. Y. 128; Patchen v. Patchen, 121 id. 432; Campbell v. Beaumont, 91 id. 467; Tilden v. Green, *supra*.)

This brings us to a consideration of the fifth item of the will. Should this item be construed as a general residuary clause, under which the son will take the estate in remainder, whatever it may be, whether it arise upon the widow's death unmarried, or upon her remarriage?

We are of the opinion that the question should receive an

affirmative answer, and the item treated as a general residuary clause.

If by this clause the testator intended to dispose of what remained of his estate, after payment of the preceeding bequests, then the words "*said sum to be regulated by the first clause of my said will and testament,*" are meaningless, and surplusage. We cannot suppose that these words were used without a definite purpose.

They expressly refer to the first clause of the will, under which, as we have seen, a residuary estate may be created upon the happening of either one of the two contingencies. I think the testator intended to make a testamentary disposition of his entire estate, and that when he made use of these words he had them in mind and intended to provide for each of them; and to express his purpose that upon the happening of either contingency his son should take the residuum of his estate, whatever it might be, absolutely. I think that is a fair and reasonable interpretation of the language of the provision.

The word "sum" evidently refers to the word "remainder," which precedes it, and was used synonymously, though inappropriately, to express the same meaning.

The court in *Matter of Miner* (146 N. Y. 121-131), says: "Unless a residuary bequest is circumscribed by clear expressions and the title of a residuary legatee is narrowed by words of unmistakable import, it will be construed to perform the office that it was intended for, viz.: the disposition of all the testator's estate, which remains after effectuating the previous provisions in the will, or which may be added by lapses, invalid dispositions, or other accident. (*Riker v. Cornwell*, 113 N. Y. 115.) The rule of construction requires of the court, in dealing with the language of a residuary gift which is ambiguous, that it should lean in favor of a broad rather than of a restricted construction: for thereby 'intestacy is prevented, which, it is reasonable to suppose, the testators do not contem-

plate.' (Lamb v. Lamb, 131 N. Y. 227.) " (See, also, Williams v. Petit, 138 App. Div. 394.)

The gift to the widow, in the event of her remarriage, is easily defined. She is given "whatever the law allows her in lieu of dower." Upon the testator's death she became entitled to a right of dower in his real property, which has not been admeasured or set apart to her for the reason that she is given the income, during widowhood, of the entire estate. There is no provision in the will, however, which deprives her of this right, or puts her to an election.

I think, therefore, that the fair and reasonable intendment of the provision is that the widow, in the event of her remarriage, shall forfeit her right to the income from the estate, and all other rights therein, except her right of dower in the real property. Her dower, in the event of remarriage, may be released to the remainderman upon payment of a reasonable consideration therefor; otherwise it must be admeasured and set off to her, in accordance with the statutory provisions in such a case.

I think the power of sale given to the widow and executor was intended to terminate and will terminate upon the widow's remarriage. In the event, however, of a sale by the remainderman of any of the real property to which her dower right attaches, before the same is admeasured or released, it will be necessary for the widow to join in the conveyance, or release her dower by a separate instrument.

My consideration of the questions involved in the interpretation of the will has led me to the following conclusions:

- (1) That the testator has made a valid testamentary disposition of his entire estate;
- (2) That the executory bequests on page two are limited upon the widow's remarriage, and will not become effective unless and until that event occurs;
- (3) That the estate in remainder, whatever it may be,

whether it arise upon the widow's death unmarried, or upon her remarriage, will pass to the son absolutely, and without any qualification, but subject to the widow's right of dower in the real property;

(4) That the widow, in the event of remarriage, will forfeit her right to the income from the estate; but will still have a right of dower in the real property; and

(5) That the power of sale given to the widow, conjointly with the son, will terminate in the event of her remarriage.

A decree in accordance with these conclusions may be entered upon the usual notice.

Decreed accordingly.

Matter of the Estate of ERNEST KEIL, Deceased.

(*Surrogate's Court, Bronx County, September, 1915.*)

TAXES—APPEAL FROM ORDER FIXING TRANSFER TAX—RIGHT OF SURVIVORSHIP.

On appeal by an executor from an order fixing the transfer tax on the estate it appeared that the decedent and his surviving wife by their joint industry and effort during decedent's lifetime had accumulated the real and personal property of which the decedent died seized and that the bond, mortgage and certificate of deposit which were assessed reflected such property so accumulated and had been taken in the name of the husband and wife;

Held, that the decedent intended when such investments were taken in his, and his wife's name, to create in his wife a right of survivorship, and that therefore the amount represented by the bond, mortgage and certificate of deposit was not subject to the payment of a transfer tax.

APPEAL from an order fixing transfer tax.

Maurice B. Blumenthal, for appellant.

John Boyle, Jr., for state comptroller, respondent.

SCHULZ, S.—The executor of the last will and testament of the decedent appeals from an order fixing the tax upon the latter's estate and urges two errors, alleged to have been made by the appraiser.

At the time of the death of the decedent there were in existence a bond secured by a mortgage on real estate made to the decedent "and Anna Keil, his wife," in the sum of \$14,000, which with interest to the date of death of the decedent amounted to \$14,245. and also a certificate of deposit issued to the decedent and Anna Keil, the latter being the decedent's wife, for \$1,000, which with accrued interest amounted to \$1,114.24. The appraiser in fixing the value of these two items for purposes of taxation assessed them at their full face value. It is urged by the appellant that they should have been assessed at one-half of that amount for the reason that they were the property of the decedent and Anna Keil, his wife, jointly.

The testimony shows that the decedent in or about the years 1876 or 1878 went into the delicatessen business in Forty-sixth street, New York city, and that he began with practically no money other than a few dollars which he borrowed; that both decedent and his wife worked in the business and its earnings were due to the efforts of both; that after some years with the money thus realized the husband and wife purchased the real property where the business was conducted and which they had theretofore rented; that subsequently when the property was sold a mortgage in the sum of \$15,000 was taken back by the decedent and his wife. This mortgage was later paid off, the money thus received to the amount of \$14,000 was invested on the bond and mortgage which is now the subject of consideration. The other \$1,000, the appellant urges, is the amount evidenced by the certificate of deposit above referred to, but as to this I find no evidence in the record.

The original source of the money now reflected in the bond

and mortgage and in the certificate of deposit, however, was the delicatessen business on Forty-sixth street. It appears that the decedent handled the money, collected the interest, made bank deposits, etc., but when he bought the real estate on Forty-sixth street with this money and subsequently invested the proceeds of this real estate, he made such investments in his own name and that of his wife.

Under the authority of *Matter of Thompson* (167 App. Div. 356), the fact that the bond, mortgage and certificate of deposit were taken in the names of the husband and wife, in the absence of evidence to the contrary, shows an intention to create in the wife the right of survivorship, and, this being so, it follows that no part of the same was subject to a transfer tax. (Citing *Sanford v. Sanford*, 45 N. Y. 723; *Matter of Meehan*, 59 App. Div. 156; *West v. McCullough*, 123 id. 846, *affd.*, 194 N. Y. 518. See, also, *Matter of Dalsimer*, 167 App. Div. 365; *Matter of Tilley*, 166 id. 240, *affd.*, 215 N. Y. 702.) No evidence appears which in my opinion would warrant me in finding that the decedent had a different intent. On the contrary, from the evidence submitted, I reach the conclusion that the money which is now invested on bond and mortgage and that which is evidenced by the certificate of deposit having had its source in the joint efforts of the husband and wife, the decedent intended when he made the investments stated to create in his wife a right of survivorship.

It follows that neither the bond and mortgage nor the certificate of deposit is liable to any tax.

Even if there had been no evidence at all as to the sources from which the money came which is now reflected in these securities, I feel that under the form of investments and under the law as enunciated in *Matter of Thompson* (*supra*), the same result would obtain.

The order appealed from is reversed and the report is remitted to the appraiser for correction as indicated.

Order reversed and report remitted to appraiser.

In the Matter of the ESTATE OF ELLEN B. LUCAS, Deceased.

(*Surrogate's Court, Bronx County, October, 1915.*)

DECEDENTS' ESTATES—FUNERAL EXPENSES—PLEADING—SUBROGATES' COURTS
—EXECUTORS AND ADMINISTRATORS—CODE CIV. PRO., §§ 2686, 2729 (3).

The petitioner paid the funeral expenses of the decedent to the undertaker and took an assignment for the same from him. The decedent died and the funeral expenses in question were incurred prior to the time subdivision 3 of section 2729 of the Code of Civil Procedure was amended and renumbered as section 2686 of the Code by the amendment of chapter XVIII thereof by chapter 443 of the Laws of 1914 that became effective on September 1, 1914. This proceeding was commenced after said amendment of 1914 took effect. The answer of the administratrix disputed the reasonableness of the amount of the funeral expenses.

Held, that under these circumstances this proceeding is governed by said section 2686 of the Code of Civil Procedure, and not by said subdivision 3 of said section 2729 of the Code prior to amendment; that, as section 2686 provides that if the answer disputes the reasonableness of the amount of the claim for funeral expenses the surrogate shall direct that the claim so disputed be heard upon the judicial settlement of the account of such administrator, the court has no power now to decide the matter nor take any proof upon it, but must direct that the claim so disputed be heard upon the judicial settlement of the account of the administratrix.

PROCEEDINGS upon the judicial settlement of the account of an administratrix.

Garvin & Young, for petitioner.

William G. Mulligan, for respondent.

SCHULZ, S.—The undertaker having charge of the funeral arrangements of the decedent has assigned his claim to the petitioner herein, a grandson of the decedent, who now begins this proceeding against the administratrix of the decedent to compel the payment of these funeral expenses. The administratrix

files an answer wherein among other things she disputes the reasonableness of the amount of the funeral expenses.

It appears that while there is no proof that the administratrix has received moneys belonging to the estate which are applicable to the payment of this claim, certain moneys were paid to the clerk of the Surrogate's Court, county of Bronx, under an order of the Supreme Court, county of Broome, which belong to said estate, which are now in the hands of the city chamberlain and which are applicable to the payment of this claim.

Section 2729, subdivision 3, which was in force prior to the recent amendment of chapter XVIII of the Code by chapter 413 of the Laws of 1914, so far as material, provided that in a proceeding of this kind "the surrogate shall, unless the validity of the claim and the reasonableness of its amount are admitted by such executor or administrator, take proof as to such facts, and if satisfied that such claim is valid shall fix and determine the amount due thereon and shall make an order directing the payment within ten days after the service of such order. * * *." By the law referred to, subdivision 3 of section 2729 was amended and renumbered so that it is now section 2686 of the Code, and became effective September 1, 1914. The section as amended, in so far as material to the present controversy, provides: "* * * If the executor or administrator files an answer setting forth the facts, and therein disputes the validity of the claim or claims, or the reasonableness of the amount thereof, the surrogate shall direct that the claim or claims so disputed be heard upon the judicial settlement of the accounts of such executor or administrator."

The purpose of the amendment as indicated by the "Report of the Commission to Revise the Practice and Procedure in Surrogates' Courts" (p. 214) is that if the claim is disputed it ought not to be tried until all interested parties are in court, hence, in such case, the trial is to be postponed until judicial settlement. In the matter now under consideration the admin-

istratrix is also the sole next of kin, but the estate appears to be insolvent, and hence creditors would be affected by the allowance of the funeral bill in question. If, then, the present proceeding is governed by section 2729, subdivision 3 of the Code prior to its amendment, I should now take proof and dispose of the matter. If, on the other hand, it is governed by section 2686 of the present Code, I have no power to hear the matter at this time but must make an order reserving it to the final accounting.

The decedent died prior to the time the amendment of 1914 became effective and the funeral bill in question was incurred at that time. The bill was paid, the assignment made to the present claimant and this proceeding commenced after the amendment of 1914 took effect. Under these circumstances, is the proceeding governed by subdivision 3 of section 2729 of the Code prior to the amendment, or is it governed by section 2686 of the present Code? The question has been determined by an adjudication in the Appellate Division which is binding upon this court. In *Matter of Kipp* (70 App. Div. 567) it appeared that subdivision 3 of section 2729 went into effect on September 1, 1901. In that case, the services were performed on or about March 19, 1901. The claim was presented June 17, 1901, and an order referring the matter to a referee to take proof and report to the court was made on December 26, 1901. There, as here, the services were rendered before the law in effect when the proceeding was commenced had been enacted, and the court says: "It is objected by the appellant that * * * as the amendment to section 2729, constituting subdivision 3 thereof, went into effect on September 1, 1901, it is not applicable to the matter at bar, as the claim accrued before the amendment became operative. It seems to be sufficient to say upon this point that the amendment of section 2729 was a mere regulation of procedure; and it is a well-settled rule that no matter when a claim may mature, the form of procedure provided for by the

law for its collection at the time the proceeding for collection is commenced must be the one adopted, and consequently the claimant was required, at the time at which he presented his application, to proceed in the manner then provided by the law for enforcing its collection."

While this question has not been raised by counsel, it follows that in the matter now before me the claimant must proceed under the provisions of the law which are contained in section 2686 of the present Code, and that I cannot decide this matter now or take any proof upon it, but must, as the said section provides, direct that the claim so disputed be heard upon the judicial settlement of the account of the administratrix.

Decreed accordingly.

Matter of the Guardianship of MARGARET CROSS.

(*Surrogate's Court, Bronx County, October, 1915.*)

GUARDIANS *—OF INFANTS—WHO MAY MAKE APPLICATION FOR APPOINTMENT—COURT GUIDED BY BEST INTERESTS OF INFANT—EVIDENCE.

The petitioner having the care and custody of an infant to which he was not related and which resided with him applied for appointment as guardian of its person and estate during its minority. Two of its maternal aunts opposed the application and claimed the right of guardianship on the ground of relationship, of their desire to care for it and of their desire that it be brought up in the faith of its deceased parents.

It appeared that the parents of the infant were of the Catholic faith, and not long prior to the death of the mother she left a memorandum expressing the wish that the infant remain in the charge of the petitioner and his wife until she returned to claim her. The mother died before returning for the infant and there was some evidence that the mother before her death expressed the desire that one of the maternal aunts have the custody of the infant. In granting the application of the petitioner, it was

* See Notes Vol. VI, pp. 161, 471; Vol. XIV, p. 150.

Held, that upon applications of this kind it is well settled that the court should be guided in reaching a determination by considering what disposition is for the best interests of the infant; that the entire matter rests in the discretion of the surrogate, which discretion is weighted with great responsibility and must be most carefully exercised in view of its importance to the infants involved who are wards of the court and entitled to its fullest protection; also

Held, that while the wishes of parents are given careful consideration by the courts in proceedings of this character, even these when fully proved and substantiated are not followed when the court is satisfied that the welfare of the child demands a different disposition; that while relatives will be preferred to strangers, all things being equal, such preference will not be given unless the court is satisfied that the welfare of the child will be promoted thereby; that the infant should receive instruction in the faith of her parents, because it must be assumed in the absence of evidence to the contrary that such would have been the wishes and desires of the parents; that the present custody of the infant should not be changed, and the petitioner should be appointed the guardian of its person and estate, upon the conditions, however, that the child receive religious instruction and training in the faith of her deceased mother until it arrives at years of discretion, and that the petitioner permit the respondents to visit the child at reasonable times.

APPLICATION for the appointment of a guardian of the person and estate of an infant.

Hirleman & Vaughan, for petitioner.

Daniel V. Sullivan, for respondents.

SCHULZ, S.—The petitioner having the care and custody of an infant and being the person with whom she resides, although not related to her, applied for his appointment as guardian of her person and estate during her minority. Upon the return of the citation, two maternal aunts of the infant opposed the application.

There is no allegation by the respondents that the petitioner is not a proper person to have the guardianship of the infant, but they claim such right of guardianship on the grounds of

their relationship to the infant, of their ability to care for her and of their desire that she be brought up in the religious faith of her deceased mother.

The events which resulted in the petitioner having the present custody of the infant are as follows: In March, 1913, the mother of the infant, who was a widow, entered the employ of the petitioner as a domestic, bringing with her the infant in question, then about four and one-half years of age. She remained in the employ of the petitioner until July, 1914, at which time, being stricken with illness, she went to a hospital, the infant remaining in the care and custody of the petitioner and his family with whom she, the mother, left a memorandum reading as follows:

" July 28 1914

" It is my wish that my little daughter Margaret reiaman (sic) in the charge of Mr and Mrs Vaupel until my return to claim her

" ELLEN CROSS."

She remained at the hospital until about May, 1915, and then went to live with the sister, one of the respondents in this proceeding, who at that time with her husband occupied a furnished room. There she resided for about seven or eight weeks and then went to another hospital, where she died on June 19, 1915.

Upon applications of this kind it is well settled that the court should be guided in reaching a determination by considering what disposition is for the best interests of the infant. (People ex rel. Pruyne v. Walts, 122 N. Y. 238; Matter of Annan, 74 Hun 19; Foster v. Mott, 3 Bradf. 409; Ullman v. Ullman, 151 App. Div. 419.)

The petitioner lives in a private house, which he owns, in a pleasant residential section of the borough of The Bronx; his family consists of himself, his wife, three daughters and one

son, his children all being of full age. He is in business for himself, conducting a billiard parlor in this city, and testifies that his income from his business is from \$35 to \$50 per week, and that in addition he has an income of from \$400 to \$500 a year from other investments. The child during the illness of the mother and her absence from the home of the petitioner and up to the present time has remained at the home of the latter, and, from the evidence before me, I am satisfied that not only the petitioner but the other members of his family have become deeply attached to her. She has been attending public school in the neighborhood for about two years and has been supported and maintained by the petitioner at his own expense for which he asks no remuneration, in a manner with which the respondents find no fault. He states that he is willing that the property of the infant, which amounts to about \$200 and consists of her mother's estate, with the exception of the sum of \$50, being the funeral expenses of the mother, be kept intact for the infant, and that he will defray the expense of her support, maintenance and education without applying any of her funds to the same.

One of the respondents resides in the borough of Brooklyn, has two infant children of her own, and with her husband and children occupies an apartment of four rooms in a tenement house. Her husband is employed as a motorman and earns \$20 per week which, so far as the evidence discloses, is the sole income of the family. The other respondent is childless and occupies an apartment of three rooms in a tenement house in the borough of Manhattan, and her husband earns the sum of \$15 per week, which appears to constitute his sole income. Both of the aunts also expressed their willingness that the infant's property be conserved for her, and I am satisfied that the respondents are people of the same good character as the petitioner.

That in proceedings of this character, the entire matter rests in the discretion of the surrogate is well settled and requires no citation of authority; and it is a discretion weighted with great

responsibility and which must be most carefully exercised in view of its importance to the infants involved who are wards of the court and entitled to its fullest protection. That the decision of the court must be disappointing to one of the two parties, both of whom I am satisfied are actuated in going to the expense and trouble which this proceeding has entailed solely by their love for this infant, is to be regretted, but unavoidable. The feelings of the parties must give way to the cardinal principle that the welfare of the child is the first consideration of the court.

Considering then the child's welfare from a material standpoint only, I am satisfied that it would not be advisable to tear her from the home which she has now enjoyed for upwards of two years, and from the family circle of which she has become a beloved member. Are there then any reasons which should move this court to deny the petition and change the custody of the child under these circumstances? There is testimony that the mother three weeks prior to her death told one of the respondents that she wished this respondent to have the custody of the infant in the event of her death, but it also appears uncontradicted that during all of this time the infant resided with the petitioner, and, although the child and one of the petitioner's daughters visited the mother at the home of the respondent on numerous occasions, there is no evidence to show that the mother ever requested that the custody of the child be transferred to the aunt, other than that stated.

I do not feel warranted upon this evidence alone in denying the petition, bearing in mind the fact that for some years there had been strained relations between the mother of the infant and the two respondents, and also the written evidence of her desire to have the child remain with the petitioner and his wife. The latter, while not showing conclusively that she wished the child to remain with the petitioner in the event of her death, indicates at least that she felt that the infant would be safe in

the custody of the petitioner until her return which, however, never occurred. While it is true that the wishes of parents are given careful consideration by the courts in proceedings of this character (*Underhill v. Dennis*, 9 Paige, 202), even these when fully proved and substantiated are not followed when the court is satisfied that the welfare of the child demands a different disposition. Thus in *Foster v. Mott* (*supra*) the court in appointing the grandfather of an infant as against the wishes of the father that his brother be appointed said: "Great respect, however, is to be paid to the wishes of the deceased parents, even where they have not been expressed in a definite or legal form, but still, after giving them every proper consideration, as a proper element to influence the mind of the judge, we come back to the question of what is the best for the welfare of the child." To the same effect are *Matter of Lamb's Estate* (139 N. Y. Supp. 685); *Cozine v. Horn* (1 Bradf. 143).

Relationship to the infant is also urged, but the trend of authority is that while relatives will be preferred to strangers, all things being equal (*Smith v. Smith*, 2 Dem. 43), such preference will not be given unless the court is satisfied that the welfare of the infant will be promoted thereby. (Code Civ. Pro., § 2649.) In *Matter of Vanderwater* (27 Wkly. Dig. 314, *affd.*, 115 N. Y. 669) the Court of Appeals says: "Whether a guardian shall be appointed, and whether he shall be selected outside of the relatives of the infant, is a matter of discretion committed to the surrogate." Other cases in which this principle is recognized are *People ex rel. Brush v. Brown* (20 Wkly. Dig. 516); *Matter of Lamb's Estate* (*supra*); *Holley v. Chamberlain* (1 Redf. 333); *Burmester v. Orth* (5 *id.* 259).

The final ground of opposition, however, is one which has caused me the gravest concern. It appears that the petitioner is of the same religious faith as the mother of the infant, his wife is of another faith, and his children have been taught in the faith of the mother, and the respondents contend, and I

believe justly and properly, that the child should be brought up in the faith of her deceased mother. Differences in religious belief between applicants for appointment as guardian and the infants for whose guardianships they prayed have been under consideration on numerous occasions and have received and are entitled to receive serious consideration in solving questions of guardianship. The infant should receive instruction in the faith of her parents because it must be assumed, no evidence to the contrary being submitted, that such would have been the wishes and desires of the parents.

If, however, the temporal welfare of the child can be secured and her religious training in the faith of her mother also be directed, then I believe that the court should follow the course which would have such a result. The petitioner in this proceeding expressed his willingness to have this child brought up **in the faith of her deceased mother, and the court** is not without precedent showing that the appointment of a guardian may be conditioned upon the infant receiving instruction in a specified religious faith. (Matter of Lamb's Estate, *supra*; Matter of Mancini, 89 Misc. Rep. 83.)

This being so, I reach the conclusion that the present custody of the infant should not be changed and the petitioner should be appointed the guardian of her person and estate, upon the conditions, however, that the child receive religious instruction and training in the faith of her deceased mother until she arrives at years of discretion, and that the petitioner permit the respondents to visit the child at such times as may be reasonable.

In making this disposition, I do not criticize the action of the respondents in opposing this application. I believe that their motives were of the highest and were actuated by an unselfish interest in this orphan child which merits sincere admiration. In awarding guardianship to the petitioner, it is to be hoped that the controversy between the petitioner and the respondents, which I trust has now been concluded, and which

was caused by the love they all have for the infant, may leave no ill will between them, but rather may result in a feeling of mutual esteem, to the end that the infant may have the benefit of being under the observation not only of her legal guardian, but also of her two aunts, all acting in accord. The petition is granted upon the conditions mentioned.

Petition granted.

In the Matter of the Application for the Revocation of Letters Testamentary Issued Under the Last Will and Testament of HENRY REINHARDT, Deceased.

(*Surrogate's Court, Bronx County, October, 1915.*)

WILLS—LETTERS TESTAMENTARY—WHEN GRANTED—WHEN QUESTION OF RELATIONSHIP TRIED BY JURY—EVIDENCE.

On a petition praying that a decree admitting a will to probate and the letters testamentary issued accordingly be revoked upon the ground that the same were obtained by a false statement of a material fact in that the proponent failed to state that the petitioner was the widow of the decedent and falsely stated that the testator left him surviving no widow, the petitioner claimed as a matter of right to have the question of relationship to the decedent tried by a jury.

Held, that the question whether the petitioner was the widow of the decedent is a preliminary question that may and should be determined before the merits of the proceeding itself are inquired into; that the fact that in some actions triable by jury the issue of marriage is involved does not fix the right to have this issue tried by a jury regardless of the action in which it arises; and that the issue presented in this case is not one of which the petitioner has a constitutional right of trial by jury.

APPLICATION for trial by jury of a controverted question of fact.

Bernard J. Tinney, for petitioner.

Edward J. Martin, for respondent.

SCHULZ, S.—The petitioner prays that a decree heretofore made admitting to probate an instrument propounded as the last will and testament of the decedent and the letters testamentary issued in accordance therewith be revoked upon the grounds that the same were obtained by a false statement of a material fact, in that the proponent failed to state that the petitioner was the widow of the decedent, that he failed to cause a citation to be issued to the petitioner as provided by law, and that he falsely stated that the testator left him surviving no widow.

The executor interposed an answer in which he raises an issue as to the relationship of the petitioner to the decedent. It thus becomes necessary to ascertain whether the petitioner is the widow of the decedent; for if she is not such widow then under the pleadings, to-wit, the petition and the answer thereto, she cannot maintain the proceeding in question. (Code Civ. Pro., § 2569.) Whether the petitioner is the widow of the decedent is a preliminary question and may and should in my judgment be determined before the merits of the proceeding itself are inquired into. (Matter of Hamilton, 76 Hun, 200; Matter of Wagner, 119 N. Y. 28; Matter of Cummins, 9 App. Div. 492; Matter of Thompson, 41 Misc. Rep. 223; Matter of Peaslee, 73 Hun, 113; Matter of Lord, 90 Misc. Rep. 222.)

The petitioner claims that she is entitled, as a matter of right, to have the question of her relationship to the decedent tried by a jury. Section 2538 of the Code of Civil Procedure, in so far as material, provides: "In any proceeding in which any controverted question of fact arises, of which any party has constitutional right of trial by jury, * * * the surrogate must make an order directing the trial by jury of such controverted question of fact, if any party appearing in such proceeding seasonably demands the same." The matter before me is a proceeding. (Code Civ. Pro., §§ 2569, 2518, 2548.) The controverted question, whether the petitioner is the wife of the decedent, is a question of fact. (Story v. Williamsburgh

Masonic Mutual Benefit Assn., 16 Wkly. Dig. 473; affd., 95 N. Y. 474.) The only question then remaining to be determined is whether the petitioner has a constitutional right of the trial of this controverted question of fact by a jury.

The Constitution (1894 in effect 1895), article 1, section 2, so far as material, provides: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." The words "heretofore used" in this section refer to the date of the adoption of this Constitution (*Wynehamer v. People*, 13 N. Y. 378), and embrace those cases in which the trial by jury was created or specifically prescribed by statute and those where such right was recognized by the common law.

Section 968 of the Code of Civil Procedure sets forth the actions in which issues are triable by a jury, and, in addition to the actions in this section specified, other actions and proceedings in which a jury trial exists as a matter of right are treated of in sections 1544, 1753, 1757, 1950, 1958, 2083 and 2247. The issue herein, however, is not referred to in any of the foregoing sections of the Code. Hence, though the cases and proceedings therein specified are triable before a jury by constitutional right, all of these sections having been in force prior to the adoption of the Constitution of 1894, the petitioner herein has no right to a trial by jury of the issue involved in this matter by reason thereof.

I have been unable to find a case holding that the issue here presented has ever been submitted to a jury, except when it arose in a case which the parties were entitled to try by jury, such as an action for dower, nor has my attention been drawn to any such case by counsel. The authorities appear to me to be opposed to such a holding. Thus in *Wood v. Platt* (57 Misc. Rep. 140), on a motion for an order framing issues and directing a trial by jury, the court said: "The only issue raised by the pleadings in this action is whether the 'plaintiff was married to defendant on or about November 9, 1901 * * *.' There

is no authority for the submission of this issue to a jury upon this motion, and the practice of submitting any issue other than that of adultery to a jury in an action of this character has been distinctly disapproved by the Appellate Division of this Department; " citing numerous cases.

In an action for divorce the relationship of husband and wife must be established; hence if controverted, and the parties were entitled to try that issue by jury and insisted upon their right to do so, it should be so tried, but in that class of actions it has been uniformly held that the issue of adultery only is triable by jury as a matter of right because of a specific provision of law. (Code Civ. Pro., § 1757; *Horn v. Horn*, 73 Misc. Rep. 14.)

The fact that in some actions triable by jury the issue of marriage is involved, does not fix the right to have this issue tried by a jury regardless of the action in which it arises. (*Wise v. Wise*, 159 App. Div. 575; *Sands v. Kimbark*, 27 N. Y. 147.)

I am of the opinion that the issue is not one of which the petitioner has a constitutional right of trial by jury and so hold, thus agreeing with the conclusions reached upon a somewhat similar application in New York county. (*Matter of Bitter*, N. Y. L. J. June 2, 1915.) The request for a jury trial is denied.

So ordered.

Matter of the Estate of MARY A. MURRAY, Deceased.

(*Surrogate's Court, New York County, October, 1915.*)

APPEAL—FROM ORDER ENTERED ON REPORT OF APPRAISER—REQUIREMENTS OF NOTICE OF APPEAL—TRANSFER TAX ACT—DECEDENT ESTATE LAW.

Decedent who died in 1913 leaving no surviving husband, child or parent, gave her residuary estate to charitable corporations. Some of the next of kin opposed the probate of the will while others of them instituted a suit in the Supreme Court to obtain like relief. As the result of a compromise among all the parties, the residuary legatees without renouncing their legacies agreed in consideration of the withdrawal of the objections and the discontinuance of the suit to pay contestants one-third of the amount passing to the residuary legatees under the will, and thereupon it was admitted to probate. The transfer tax appraiser reported that the residuary estate was exempt from taxation under the Transfer Tax Act. *Held*, that an appeal by the state comptroller from the order entered on the report of the appraiser on the ground that his distribution of the estate was in contravention of sections 17-20 of the Decedent Estate Law must fail as section 17 was not applicable and sections 18, 19 and 20 were repealed by chapter 857 of the Laws of 1911.

A notice of appeal which states "that the order entered fixes and assesses an inadequate and insufficient tax on the transfers of the property of said decedent" is a sufficient compliance with the provision of the Transfer Tax Law which requires that a notice of appeal "shall state the grounds upon which the appeal is taken."

APPEAL from an order fixing and assessing the transfer tax.

Lafayette B. Gleason (Schuyler C. Carlton and Alexander Otis, of counsel), for state comptroller.

Parsons, Closson & McIlvaine (William E. Carnochan and Edward C. Sperry, of counsel), for executor.

FOWLER, S.—The decedent, who died October 22, 1913, by her will gave her entire residuary estate to ten charitable corporations, each of which, from the nature of its work and the

proofs submitted by it relative to the same, is entitled to exemption from the imposition of the transfer tax. It seems that some of the decedent's next of kin interposed objections to the probate of the will, while others of them instituted a suit in the Supreme Court in order to obtain like relief. Subsequently a compromise agreement was entered into by all the parties, the result of which was that the residuary legatees agreed, in consideration of the withdrawal of the objections and the discontinuance of the action in the Supreme Court, to pay to the contestants one-third of the amount passing to such residuary legatees under the terms of the will. Then only was the will admitted to probate.

On this state of facts the transfer tax appraiser found in his report that the transfer of the residuary estate was exempt from taxation under the Transfer Tax Act. The state comptroller now appeals from this report of the appraiser and from the order entered thereon upon the grounds, *first*, "that the appraiser erred and made a distribution of the estate that does not accord with the law in that it is in contravention of the terms of sections 17 to 20, inclusive, of the Decedent Estate Law of the State of New York," and, *second*, and in "that the order entered as above fixes and assesses an inadequate and insufficient tax on the transfers of the property of said decedent."

As to the first ground of appeal, let us observe that sections 18, 19 and 20 of the Decedent Estate Law were repealed by chapter 857 of the Laws of 1911, in effect July 29, 1911. Section 17, the only one of said sections remaining unrepealed, relates to instances where the decedent leaves a husband, a child or a parent him surviving. In the event of such survivorship the benefaction to any charitable corporation would be limited to one-half of decedent's estate. The decedent here did not, however, leave surviving a husband, a child or a parent, so the appeal on this ground must fail.

The respondent urged upon the argument of the appeal that

the second ground of appeal did not conform with sufficient exactitude to the provision of the Transfer Tax Law which requires that a notice of appeal "shall state the grounds upon which the appeal is taken." I do not agree with this contention. The ground set forth is, in my judgment, sufficient.

An examination of the compromise agreement shows that paragraph fifth thereof provides in substance that the residuary legatees authorize the person who may become executor or have charge of the administration of the estate to divide the residuary estate into three equal parts and to make the distribution in the manner above referred to, *i. e.*, two-thirds to the residuary legatees named in the will and the other third to the decedent's next of kin, such distribution to be in full satisfaction of the legacies coming to said residuary legatees. "The amounts of such payments to the next of kin were thereby released and assigned by said corporate legatees to said next of kin respectively out of the respective legacies of the said corporate legatees." In the two cases cited by the appellant in support of his contention (*Matter of Wolfe*, 89 App. Div. 349, *affd.*, 179 N. Y. 599, and *Matter of Merritt*, 155 App. Div. 228), the facts were not the same. In each of those decisions it appears that renunciations of legacies, wholly or in part, were obtained, whereas in this case at bar no renunciation whatever was given. To quote the language of the compromise agreement before referred to, the residuary legatees "released and assigned" to the next of kin the share paid in settlement. Consequently I venture to think that the rule laid down in *Matter of Cook* (187 N. Y. 253), which case is very similar in some respects to the one under discussion, is controlling in the disposition of this ground of appeal. In *Matter of Cook* the decedent died, leaving a widow, an adopted daughter, a child of said adopted daughter, whom the testator describes as his grandson, and several nephews and nieces. By his will he created a fund of \$50,000 for the benefit of said grandson, with remainder over to

such grandson's wife and children, if he left any. The residue of decedent's estate was given to decedent's nephews and nieces. The widow and adopted daughter objected to the probate of the will, with a result that a compromise was arrived at, by which the residuary legatees assigned and transferred to the widow all their interest in the residuary estate of the decedent. At page 259 the Court of Appeals *inter alia* said: "The compromise did not change the will. No settlement could change a word that the testator wrote. The will stands as it was written, and a most solemn instrument, executed by all parties interested, could not convert a bequest to the nephews and nieces into a bequest to the widow. * * * A succession tax is measured by the legal relation which the legatees bear to the testator and is not affected by the relation which an assignee of the legatee bears to him." The court emphasized this principle at page 260: "As she (*i. e.*, the widow) did not take through the will, the succession tax cannot be fixed at the rate of one per cent., as in the case of a bequest to a widow, but must be fixed at the rate of five per cent., as in the case of a bequest to nephews and nieces." For the reasons stated the appeal is therefore dismissed and the order fixing the tax is affirmed.

Appeal dismissed and order affirmed.

Matter of the Estate of PAUL GUMBINNER, Deceased.

(Surrogate's Court, New York County, October, 1915.)

TAXES—TRANSFER TAX—WHEN GOOD-WILL CONSTITUTES AN ASSET OF DECEDENT'S ESTATE *—WILLS—EVIDENCE—REPORT OF APPRAISER.

While the facts that decedent, who for nearly twenty years immediately preceding his death had conducted a manufacturing business, did not advertise in trade publications or daily newspapers but depended solely upon traveling salesmen for the sale of his manufactured product may be considered in estimating the good-will of the business they do not necessarily prove that there was no good-will; if, after deducting a reasonable sum for the services of decedent and for interest on capital invested, the business showed profits it had a good-will that constituted an asset of decedent's estate.

The average net profits of the business for the five years next preceding the date of decedent's death, to be ascertained as indicated by the court, multiplied by two, held to represent the value of the good-will of the business.

The evidence showing that certain machinery in a factory located in another state and run by decedent in connection with his business did not constitute a part of the building and was not erected in such a manner that its removal would materially alter or deface the building, the appraiser was correct in including in the assets of the estate the said machinery.

Decedent having directed that the income from his residuary estate be paid to his widow and daughter during their respective lives and upon the death of the survivor that the principal be divided among the surviving issue of the daughter *per stirpes* and in the event of her death without leaving issue such remainder to be divided into sixty equal parts and paid to the various legatees mentioned in the will, the remainder should be divided into sixty parts and each legacy presently taxed as if it were bequeathed to an individual of the five per cent. class.

APPEAL from an order assessing a transfer tax.

Lafayette B. Gleason (Schuyler C. Carlton and Alexander Otis, of counsel), for state comptroller.

See Note Vol. III, p. 392.

Albert Erdman (M. R. Ryttenberg, of counsel), for executor.

FOWLER, S.— The executors of decedent's estate appeal from the order assessing a transfer tax upon the estate and allege that the appraiser's valuation of the business conducted by the decedent prior to his death was excessive. The decedent was the sole owner of the business conducted by him under the name of Paul Gumbinner Company.

The appraiser estimated the value of the business at \$286,067.14. His report, however, does not contain an itemized statement showing the value which he placed upon the various items constituting the assets of the business. The evidence before him showed that the market value of the merchandise on hand at the date of decedent's death was sixty-six per cent. of its cost price; that the value of the machinery in the factories was \$7,835.10, although it was carried on the books at about \$66,000, and that the value of the entire business, exclusive of good will, was \$239,821.04.

Much evidence was submitted by the executors to show that the business had no good will. While it has been established by the decedent in 1892 for the manufacture of silken neckwear, veilings, etc., he owned no patents or trade marks in connection with it; he did not advertise in trade publications or the daily newspapers, but depended upon traveling salesmen for the sale of his manufactured products. While these facts should be taken into consideration in estimating the value of the good will, they do not necessarily prove that there was no good will. The business was conducted under the same name for more than eighteen years and, so far as the evidence discloses, had the same principal office during that time. If, therefore, it showed profits, after deducting a reasonable sum for the services of the decedent and for interest on the capital invested, it had a good will that constituted an asset of the estate.

The executors have submitted a statement showing the gross

profits for the years 1903 to 1909 inclusive. This statement shows an average deduction of about \$3,000 as "income from investments." There is no explanation of the nature of these investments. If it is income from the investment of any part of the capital employed in the business it should be deducted from the interest allowed on the capital in ascertaining the net profits for the purpose of determining the value of the good will. In the statement referred to the executors also claim a deduction of \$15,000 each year from the gross profits for depreciation of buildings, fixtures, machinery and stock. It appears that the decedent in his annual statements did not make any allowance for depreciation of buildings, machinery, etc. There is no evidence in the appraiser's report as to the character of the buildings used by the decedent as factories, but the increase in the value of the ground is usually equivalent to any depreciation in the value of a brick or stone structure erected upon it. The decedent's books do not show any allowance for depreciation of the stock inventoried at the end of each year. This, however, is merely a detail of bookkeeping, as, if the deduction for depreciation were made in the inventoried value of the stock each year, such deduction would necessarily be reflected in the profit and loss account of the succeeding year, and would not substantially alter the ratio between capital and profit and loss as shown on the books of the company. As the executors ask for a deduction for depreciation of merchandise inventoried, without allowing for such deduction in calculating profit and loss at the end of the year, their contention in this respect should not be allowed. They should, however, be allowed a reasonable deduction for depreciation of machinery and fixtures. These become worn and obsolete in the course of fifteen or twenty years, and a fund should be set aside for their replacement. As the evidence shows that most of the machinery installed by the decedent in his factories in 1892 was still in operation at the time of his death, although in a worn and dilapidated condition, I think a reason-

able deduction for depreciation upon such machinery would be a percentage which would produce a fund sufficient to replace them in eighteen years. For this purpose a depreciation of 6 per cent. is liberal and should be allowed by the appraiser.

The drawings of the decedent for his personal account should, in the absence of evidence that they were excessive, be regarded as the value of his services to the business, and should also be deducted in arriving at the net profits. There should also be deducted interest on the capital employed. As these items are contained in the statement submitted to the appraiser by the executors, it is only necessary to modify that statement by reducing their estimate of depreciation, namely, \$15,000, to the figure represented by the deduction of 6 per cent. upon the value of the machinery in both factories. The average net profits for the five years preceding the date of decedent's death, ascertained as here indicated, and multiplied by two, will represent the value of the good will.

The appraiser was correct in including in the assets of decedent's estate the machinery in the factory at Emaus, Pa., as the evidence showed that this machinery did not constitute part of the building, and that it was not erected in such a manner that its removal would materially alter or deface the building.

The executors also appeal from that part of the order entered upon appraiser's report which assessed a tax upon the remainder after the life estates of decedent's widow and daughter, as if such remainder passed to one beneficiary of the 5 per cent. class. The testator directed that the income from his residuary estate be paid to his widow and daughter during their respective lives, and upon the death of the survivor that the principal be divided among the surviving issue of the daughter *per stirpes*; in the event of the daughter dying without leaving issue, such remainder to be divided into sixty equal parts and paid to the various legatees mentioned in the will.

Section 230 of the Tax Law provides that when property is

transferred in trust, and the interests of the transferees are dependent upon conditions whereby they may be defeated or abridged, a tax shall be imposed upon the transfer at the highest rate which, upon the happening of any of the contingencies or conditions, would be possible. In *Matter of Zborowski* (213 N. Y. 109) it was held that such interests are presently taxable. The contingency which would defeat the vesting in possession of the interests bequeathed to the issue of the daughter would be the death of the daughter without issue, and the highest rate which could be imposed upon the remainder would be the rate at which it would be assessed in such a contingency. Therefore, the remainder should be divided into sixty parts, and each legacy taxed as if it were bequeathed to an individual of the 5 per cent. class. That part of the remainder which would go to exempt corporations in the contingency mentioned is not now subject to taxation.

The order fixing tax will be reversed and the appraiser's report remitted to him for the purpose of ascertaining the value of the good will as herein indicated. The order to be entered upon his report should conform to this decision in regard to the taxation of the remainder.

Order reversed and appraiser's report remitted.

**Matter of the Judicial Settlement of the Account of Proceedings
of FREDERIC R. COUDERT, as Executor of the Last Will and
Testament of ALCIME BAILLARD, Deceased.**

(Surrogate's Court, New York County, October, 1915.)

**WILLS—OF MOVABLES—GOVERNED BY LAW OF TESTATOR'S LAST DOMICILE—
RIGHTS OF LEGATEE.**

A will of movables is generally, in the absence of other intentions, to be governed by the law of the testator's last domicile.

Where under a French will of a domiciled Frenchman there is a universal succession to movables, the rights of a legatee thereto depend on the law of France, although the will may have been probated in the state of New York in the first instance.

PROCEEDING upon the judicial settlement of the accounts of
an executor.

Coudert Bros., for executor.

FOWLER, S.—The will of Alcime Baillard, a native of France, dying in France, was duly proved in this jurisdiction. The will in question was executed in Paris, but in conformity with the law of New York. The property of M. Baillard was, at his death, in New York, where for some portion of his life testator had sojourned. The will is in the French tongue and technically it corresponds with the requirements of the law of France regulating last wills and testaments. It appoints the daughter of testator, Mme. Carassale, the wife of the Consul for Uruguay at Nice, "universal legatee," subject, however, to certain life legacies or usufructs for the lives of legatees: "Je lègue à ma fille Georgine Baillard, épouse de Monsieur Americo Carassale, Consul de l'Uruguay à Nice, avec lequel elle demeure dans la dite ville, tous les biens meuble et immeuble, droits et actions mobilières et immobilières qui m'appartiendront lors de

mon décès et composeront ma succession, en quoi qu'ils puissent consister et en quelques endroits qu'ils soient dûs et situés, sans aucune exception, ni réserve, je l'institute en conséquence ma légataire universelle à charge de supporter et d'exécuter les legs d'usufruit et rente viagères constituées au cours de présent testament."

Mr. Coudert, the sole executor, having now administered the estate in New York and having instituted this proceeding, presents to us a decree providing for the remittance of the balance, now held by executor for distribution, to Madame Carassale, the universal legatee of M. Baillard, without bonds; the same to be held by her in conformity with the law of the testator's last domicile, viz, France. If the will is to be construed according to the law of this state, Madame Carassale might be held to be a trustee for the life beneficiaries mentioned in the will. This construction is not desired and not pressed.

What, then, is the proper construction of this will? It must be remembered that it is a will of a Frenchman last domiciled in France. The administration has taken place here thus far simply because the property of the deceased happened at his death to be in this jurisdiction. Such property is altogether movable or personal property. Ordinarily "*mobilia sequuntur personam*." The fact that the will in question was proved in this jurisdiction does not necessarily make this the principal place of administration. The testator was domiciled in France when he died and his movable property necessarily occupies the situs of the testator's last domicile. France, therefore, should be regarded in this case as the principal and not the ancillary place of administration.

It should not be forgotten that there is under this will a universal succession. Now, if we have regard to the law of France a "*universitas juris*" or a universal succession is always governed by the *lex loci domicilii* (Thèse, par le Docteur en droit, Marion, p. 13, et seq.). But independently of the principle just

stated, a will of movables is generally, in the absence of other intention, to be governed by the laws of a testator's last domicile. (Westlake, *Private International Law* [5th ed.] 170; Bentwich, *Domicile & Succession*, 101; Dicey, *Conflict of Laws* [2d ed.] 679; *Parsons v. Lyman*, 20 N. Y. 103; *Despard v. Churchill*, 53 id. 192.) Thus it is that where children are entitled to *legitim* by the law of testator's last domicile any provision in the will in derogation of *legitim* must give way to the law of testator's last domicile. (*Thornton v. Curling*, 8 Sim. 310; *Hog v. Lastaley*, 6 Bro. P. C. 377; *Kilpatrick v. Kilpatrick*, Id. 58; *Munro v. Douglas*, 5 Mad. 394.) To give effect to the principle indicated, administration in a foreign jurisdiction will sometimes be stayed in order to await and abide by the construction of the courts of the last domicile.

But we are not without domestic authority on these and similar points. That the decree in this case should provide that the surplus be remitted to the universal legatee to be disposed of by her in accordance with the will and the law of the testator's last domicile I have no doubt. (*Despard v. Churchill*, 53 N. Y. 192; *Hardenberg v. Manning*, 4 Dem. 437.) While it may be that there is a substitution under French law (corresponding to the trusts known to our law), of which substitution the usufructuary legatees are beneficiaries, that is for the French law to determine. I am also of the opinion that the universal legatee should not be required to give security.

Decreed accordingly.

Matter of the Judicial Settlement of the Account of THOMAS B. KENT, as a Testamentary Trustee of the Trusts Created by the Will of Thomas Rutter, Deceased, and of the Account of SAMUEL J. RIKER, JR., as a Trustee of the Trusts Created by Said Will.

(Surrogate's Court, New York County, October, 1915.)

**TESTAMENTARY TRUSTEES—ACCOUNTING BY—JURISDICTION OF SURROGATE—
CONSTITUTIONAL LAW.**

A surrogate upon the judicial settlement of the accounts of a testamentary trustee has not the general equitable jurisdiction and power of a chancellor; he cannot refer a part of the objections interposed to the account but must refer all or none.

Whether the late legislation attempting to confer general equity jurisdiction on the surrogate is constitutional, *quare*.

The practice on motion to file affidavits affecting the subject-matter of the accounts indicated.

The intermediate application of a legatee for payment of her share granted.

PROCEEDING upon the judicial settlement of the account of a testamentary trustee.

Leon W. Gibson (Lewis L. Delafield, of counsel), for testamentary trustees.

Davies, Auerbach & Cornell (Joseph S. Auerbach and Charles H. Tuttle, of counsel), for Beatrice R. Moore.

FOWLER, S.—Here are three motions: On July 22, 1915, Beatrice R. Moore filed a petition praying for the delivery to her of part of her one-fourth share of the residuary personal estate. She now moves accordingly. This motion (No. 1) is opposed by the trustees.

On September 28, 1915 (the return day of the accounting proceeding), a motion was made on behalf of the trustees for an order directing that a certain affidavit of Samuel Riker, Jr., be filed as part of the record in the accounting proceeding "to the end that the matters therein referred to may be investigated by the court and that such direction with respect to such matters may be given as shall be legal and proper." This motion (No. 2) is opposed by the objectant, Beatrice R. Moore.

On September 28, 1915, the trustees applied for the appointment of a referee to hear and determine the issues raised by the objections filed to the trustees' account. This motion (No. 3) is opposed by Beatrice R. Moore, who requests the surrogate to hear the entire matter or else to dispose in the first instance of all questions of law.

It would appear that Thomas Rutter died a resident of New York county May 3, 1895. His last will and testament was admitted to probate by this court May 24, 1895. Letters testamentary thereon were issued to John R. Rutter, Thomas B. Kent and Edward Ritzema DeGrove, May 25, 1895. The sixth clause of Mr. Thomas Rutter's will bequeathed and devised his residuary estate in trust to pay the net income therefrom to testator's wife, Georgianna, and at her death to divide the same into as many parts as there should then be children of the testator and deceased children leaving issue, with a separate and distinct trust for the benefit of each child during the life of such child. In the event of the death before testator's widow of any such child, leaving issue, such deceased child's share was directed to be paid to such issue on the death of the widow.

Testator's widow, Georgianna Rutter, died January 23, 1914. Three of testator's children survive her, namely, J. Edgar T. Rutter, Mrs. Maud R. Garr and Mrs. Cora R. Kent. Mrs. Beatrice R. Moore, a daughter of John R. Rutter, a deceased son of the testator, was the only issue of a deceased child of testator living at the death of the widow. On November 12,

1897, a decree was made by this court judicially settling the accounts of John R. Rutter, Thomas B. Kent and Edward Ritzema DeGrove as executors of the last will and testament of the testator. All parties interested in the estate were cited to attend this accounting. The decree of November 12, 1897, discharged the executors and directed that the balance of the estate be paid to the trustees to be administered according to the trust provisions of the will.

Of the executors and trustees who originally qualified John R. Rutter (testator's son) died April 26, 1899, and Edward Ritzema DeGrove died July 17, 1911. On August 27, 1911, Samuel Riker, Jr., was appointed substituted trustee. The trustees now acting are Thomas B. Kent and said Samuel Riker, Jr. Upon the death of the widow, January 23, 1914, Beatrice R. Moore, the issue of the deceased son of the testator, claims to have become entitled, under the terms of the will, to one-fourth of the residuary estate. If so, upon the happening of the same contingency, the three children of the testator became entitled to a division of the residuary estate and the erection of separate trusts for each of them. On August 13, 1914, Beatrice R. Moore filed in this court a petition to compel the said Samuel Riker, Jr., and Thomas B. Kent, as trustees, to render and judicially settle their account. A citation was duly issued, and on or before the return day the trustees voluntarily filed their account with a petition for its judicial settlement. Mrs. Moore and all other parties interested were cited. Objections to the said account were filed by Beatrice R. Moore and J. Edgar T. Rutter, a son of the testator. On August 2, 1915, Beatrice R. Moore obtained an order for an examination of the trustees for the purpose of framing further objections to the account. No order has yet been made consolidating the voluntary accounting proceeding and the compulsory accounting proceeding.

I will dispose of the motions enumerated above in their inverse order. The motion to refer the issues raised by the objec-

tions to the account is coupled with a request that the surrogate in the first instance dispose of all questions of law and refer only the matters of fact to a referee. I am more than doubtful of my power to split up a reference. No doubt a chancellor, or a judge invested with full and complete equity jurisdiction, could adopt this course last indicated. But the surrogate's equitable powers are not, I think, so complete. Let us glance for a moment at the equitable jurisdiction of the surrogates in proceedings to settle judicially the accounts of testamentary representatives.

The extent of the equitable jurisdiction of the surrogates of New York in the course of the settlement of the accounts of the representatives of persons deceased is not doubtful prior to the Revised Statutes.

Long prior to our Revised Statutes of 1830 the courts of probate in New York had enjoyed a limited and inherent jurisdiction to require the personal representatives of a deceased person to file an inventory and an account of their proceedings. The jurisdiction of compulsory accountings was then closely connected with the allied power to require the production of an inventory by executors and administrators. So much so was this the case that as late as 1841, eleven years after the Revised Statutes took effect, Chief Justice BRONSON of this state saw little difference between an inventory and an account, thus showing that legal traditions tend to linger on in the interstices of the law. (*Bloom v. Burdick*, 1 Hill, 130.)

The jurisdiction of the original courts of probate in New York over inventories and accounts was defined by the jurisdiction of the Ecclesiastical Courts known to the common law of England after the reign of Henry VIII. (*Matter of Martin*, 80 Misc. Rep. 17, 21.) That the courts spiritual did originally entertain such objections can not be doubted. (*Smith v. Price*, 1 Lee, 569; *Brown v. Atkins*, 2 id. 1; *Hackman v. Black*, id. 251; *Phillips v. Bignell*, 1 Phill. 239; *Gale v. Luttrell*, 2 Add. 234;

Telford v. Morison, Id. 319, 330; 4 Burns Ecc. Law, 609; Toller Exr's, 246, 489, 490; 1 Story Eq. Juris. §§ 536, 537.) The surrogate's inherent and original jurisdiction (independent of a particular statute) over accountings was, I think, recognized in Bevan v. Cooper (72 N. Y. 328, 329). Such jurisdiction was regarded as derived from the original probate courts of New York or as annexed to the grant of a probate jurisdiction.

It will be remembered that subsequently to the "Reformation" and the reign of King Charles I, in the continuing conflict between the courts secular and the courts spiritual, it was first made a question whether the Ecclesiastical Courts of probate could entertain objections to the inventory at the suit of a legatee; the only instance in which a jurisdiction over accounts was then claimed by the spiritual courts. (1 Story Eq. Juris. § 537.) The jurisdiction of the Ecclesiastical Courts over accounts was denied in *Catchside v. Ovington* by Lord MANSFIELD (Bur. Mans. 1922). Such jurisdiction was, however, afterward vindicated by Sir John NICHOLL in a judgment which is generally regarded by those versed in the jurisdiction of courts as one of the most notable in our jurisprudence. I refer to *Telford v. Morison* (2 Add. 321). I have very often read that notable opinion, and always with increasing admiration for the courage and the dignity of that very great judge under most trying conditions. The Ecclesiastical Courts in England thereafter continued, when not prohibited by the secular courts, to exercise a jurisdiction over objections to accounts. (4 Burns Ecc. L. 424.) The judgment in *Telford v. Morison* was, however, delivered only in the year 1824, or more than a century after the trichotomy of the old judicial establishment known to the common law system had been finally transferred to New York, which, in spite of its origin and the title by the conquest of 1664, more closely than any other American colony adopted and adhered to the institutions of the common law, at least until our independence of the crown, when a new influence became manifest.

I have so often referred to the general jurisdiction of our courts of probate under the various New York governments that I will not repeat it. (Cf. *Matter of Martin*, 80 Misc. Rep. 21 et seq.) I will confine myself here to their jurisdiction over accounts.

The act for regulating the fees of the re-established courts of this state, passed in the year 1785 (Laws of 1785, chap. 71), recognized the continuing jurisdiction of surrogates to examine and prove inventories and accounts, for the surrogate is there authorized by law to take fees therefor. Coote in his work on the practice of the Ecclesiastical Courts gives a fair resumé of the practice followed in New York by the former surrogates on objections to inventories and accounts prior to the Revised Statutes. Such jurisdiction was limited, but settled by very well established rules unnecessary to discuss, but perpetuated in principle by the Revised Statutes of 1787 (2 J. & V. 71) and 1813 (1 R. L. 311, 444). The Revised Statutes of 1830 finally perpetuated some principles, but enlarged the jurisdiction. (2 R. S. 91.) The early surrogates' practices of this state are very silent on the question of the original jurisdiction of surrogates over accounts and generally are content to refer without comment to the latest statutes of the state. But the early reports very well indicate the practice in accountings, although there are many earlier cases in New York, as yet left unreported, which would disclose far more. (*Seymour v. Seymour*, 4 Johns. Ch. 409; *Guild v. Peck*, 11 Paige, 475; *Foster v. Wilbur*, 5 id. 537.) The intimate connection of even the radical Revised Statutes with former practice is illustrated by the explanatory citations employed even after 1846 in such decisions as that in *Gratacap v. Phyfe* (1 Barb. Ch. 485); *Harris v. Ely* (25 N. Y. 138, 141) and *Bevan v. Cooper* (72 id. 317, 328, 329).

It was only with and subsequent to the Revised Statutes that the proceeding for a judicial settlement of accounts of representatives of a deceased by the surrogate tended to become a sub-

stitute of the former administration suit in chancery, or what is now called "a judicial settlement of the account." (See 2 Woerner Adm. [2d ed.] 1218.) We find thereafter that the adjudications in accounting proceedings more rarely refer to the law anterior to the Revised Statutes themselves. (See the overruled case of *Westervelt v. Greggs*, 1 Barb. Ch. 469; *Stagg v. Jackson*, 1 N. Y. 206.)

Yet as early as 1822 there was observable in this state a tendency to broaden by statute the original jurisdiction of surrogates in proceedings to settle accounts, and by statute of that year they were authorized to call executors to account for the proceeds of real estate sold by them for the payment of debts and legacies. (*Clark v. Clark*, 8 Paige, 152.) But this act gave the surrogate no jurisdiction to take the account of trustees of a testamentary power not given to executors. (*McSorley v. Wilson*, 4 Sandf. Ch. 514; *Matter of Hawley*, 104 N. Y. 263.)

The present jurisdiction of the surrogates in proceedings for the judicial settlement of final accounts of executors and administrators and testamentary trustees may then be justly said to begin with and date from the Revised Statutes of 1830. Such proceedings tended thereafter to become what they now are, practically the former administration suits in chancery. (1 Pom. Eq. Juris. §§ 77, 187, 235; Story, Eq. Juris. chap. 9.) The Revised Statutes provided for the effect of a surrogate's decree in judicial accountings, making it conclusive in certain specified particulars upon the matters embraced in the account against all persons interested, but only provided they were cited or did not voluntarily appear. (2 R. S. 94, § 65, perpetuated by the Code, § 2742, Code Civ. Pro. of 1913; *Joseph v. Herzig*, 198 N. Y. 456; *Chester v. Buffalo Car Mfg. Co.*, 183 id. 425, 435; *Matter of Killan*, 172 id. 547; *Bowditch v. Ayrault*, 138 id. 222, 231.) The new Surrogates' Law would seem to enlarge the effect of such decrees. (Code of 1915, § 2742.)

The powers of the legislature to establish a summary remedy

in the Surrogates' Courts for the settlement of the estates of deceased persons and to enable surrogates for that purpose to decide on all claims and matters affecting the estate seems not to have been doubted (*Kidd v. Chapman*, 2 Barb. Ch. 414), notwithstanding that the original jurisdiction of the courts of equity in New York included the same powers. As the jurisdiction of the Court of Chancery was fixed by the Constitution of the state, and the surrogates' jurisdiction of proceedings to settle judicially the accounts of representatives of estates tended really to detract from the regular equity jurisdictions so fixed by the Constitution, it was regarded as doubtful whether the legislature could invest the Surrogates' Courts with such equity powers.

It is just at this point that the ancient jurisdiction of the surrogates of New York over accounts became important to constitutional principles, for if the surrogates had no original jurisdiction over accounts, a transfer of the jurisdiction of a constitutional court to the surrogates might have been unconstitutional. (*Alexander v. Bennett*, 60 N. Y. 204.) Cf. *Matter of Runk* (200 N. Y. 447) where there is a dictum purely obiter to the contrary. The amplification by the legislature of an ancient jurisdiction stands doubtless on another principle, for then a concurrent jurisdiction is only added to a similar jurisdiction, as intimated in *Matter of Runk* (*supra*).

Little by little the legislature by acts unnecessary now to specify has invested Surrogates' Courts in accounting matters with much of the jurisdiction exercised in the old court of chancery in administration suits. (*Sheldon v. Bliss*, 8 N. Y. 34; *Seaman v. Duryea*, 11 id. 328; *Wood v. Brown*, 34 id. 337; *Thomson v. Taylor*, 71 id. 217, 219; *Hyland v. Baxter*, 98 id. 610; *Garlock v. Vandevort*, 128 id. 374, 378; *Matter of Schnabel*, 202 id. 134, 137.) The history of administration suits in chancery and the story of the mode by which the Ecclesiastical Courts were deprived of their original jurisdiction over legacies are very well outlined, with some reference to the adjudications

in Jenk's Short History of English Law (pp. 226-230). But the technical limitations on such administration suits are only to be found in the adjudications.

In a suit in chancery for the administration of assets the usual practice was to refer the matter to the master in chancery, to take an account of the debts, funeral expenses and pecuniary legacies, to compute interest, to advertise for creditors and legatees to appear and prove their claims within a limited time, and to take an account of the personal estate which might have come into the hands of the executors or of any other person, by his order or use, and that the personal estate be applied in payment of debts, funeral expenses and legacies in a course of administration. (Hoffman, Ch. Pr. 180, 181.) A party dissatisfied with the report of the master in chancery might file exceptions. (Id. 184.) In *Thompson v. Brown* (4 Johns. Ch. 619) discussed by Hoffman at pages 187, 188, two propositions were laid down — one that where a creditor files a bill, either for himself or for all the creditors, the decree for an account is for the benefit of all the creditors, and in the nature of a judgment, and that all may come in and prove their demands, and that from the date of the decree the court will enjoin creditors from proceeding at law and will take jurisdiction of the sole distribution of the assets. In such distribution all judgments prior to the decree were preferred according to their priority in time, and all other debts ratably, without regard to legal priorities, and irrespective of whether the assets administered were legal or equitable.

In administration suits the executor or administrator was a necessary party if the suit affected the personalty. (Story Eq. Pl. § 171.) Third persons who had possession of the personalty, or were liable to account therefor, under particular circumstances, might also be joined. For example, if there was alleged to exist collusion between such third persons and the legal representatives, or if the latter were insolvent or refused to collect the outstanding claim, or also, if the third person was a surviving

partner of the decedent. (Id. § 178.) Heirs at law or devisees were necessary parties, if it was sought to charge the realty or to sell the realty. Where no heir could be found it was usual to make the attorney-general a party. (Id. § 180 and note.) If the object of the bill was to carry into effect the trusts created by the will, without establishing the will, a decree might be made in the absence of an heir. (Id. § 181.) Both executors and administrators must be parties. (Id. § 218.)

Administration suits were controlled by the rules then governing parties to bills and cross-bills. Cross-bills could not introduce new parties. (2 Daniell Ch. Pr. § 1548, note.) Here was a very distinct limitation on the jurisdiction of a court of equity, for if new parties could not be introduced the issues jurisdictional in administration suits were necessarily to be confined to the matters alleged in the original bill for administration. But the primary limitation on the equity jurisdiction in administration suits was that where a debt of a creditor was disputed, it must be first established at law.

Since the Revised Statutes the legislature has proceeded to assimilate the jurisdiction of the surrogate to that of the court of chancery in suits for the judicial settlement of the accounts of executors and administrators. Chapter 576 of the Laws of 1910 was a great step forward (repealed by the Surrogates' Law of 1914). It provided as follows: "The surrogates' court has also jurisdiction upon a judicial accounting or a proceeding for the payment of a legacy to ascertain the title to any legacy or distributive share, to set off a debt against the same, and for that purpose ascertain whether the debt exists, to affect the accounting party with a constructive trust, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter." (Code Civ. Proc., § 2472a, Laws of 1913.) The idea that this enactment much enlarged the surrogates' jurisdiction has been generally entertained. (Matter of Carey, 77 Misc. Rep. 602, 605.) That in some respects the surrogates' equitable

jurisdiction was larger than the jurisdiction of the chancellor in administration suits is apparent. That the surrogate had power before 1910 to ascertain who were legatees and distributees is not doubtful, but his jurisdiction to raise constructive trusts or to try disputed titles to legacies or distributive shares by reason of equitable considerations was due solely to the act of 1910. (Matter of Randall, 152 N. Y. 508; Matter of Monroe, 142 id. 484; Matter of Keleman, 126 id. 73; Fulton v. Whitney, 66 id. 557; Meeks v. Meeks, 122 App. Div. 461; Matter of Losee, 119 id. 107, 111.)

In England to this day the remodeled probate courts possess no such large powers or jurisdiction as those now vested in the surrogates of New York state. In England proceedings for such accounts and distribution of estates lie only in the Chancery Division of the Hight Court of Justice, and if a creditor institutes such proceedings his debt, if disputed, must in some way be first established in an action by or against the executors. (Matter of Powers, 30 Ch. Div. 291. See 2 Williams Exrs. [10th ed.] 1632, 1650.) In Pennsylvania the issues arising on devises are not yet justiciable in the Orphans' Courts on an audit of an account, but all such matters go to the Common Pleas Courts of that state for final decision and disposition. No jury trial is known in the probate courts of England or Pennsylvania. That the proceedings in England or Pennsylvania are less efficient or more dilatory and expensive than under the system employed in this state has never been asserted by any one familiar with the various jurisdictions.

Notwithstanding the legislation of 1910 in this state, it is extremely doubtful that the powers of a court of equity even thereafter appertained to a Surrogate's Court (Matter of Randall, 152 N. Y. 508; Matter of Thompson, 184 id. 36, 44; Matter of Schnabel, 202 id. 129, 137; Matter of Hasbrouck, 153 App. Div. 394, 398; Stilwell v. Carpenter, 59 N. Y. 414; Meeks v. Meeks, 122 App. Div. 461, 463); or, as it is sometimes

expressed by other courts, the legislature had not yet made "chancellors out of surrogates." (Matter of Bolton, 159 N. Y. 135; Matter of Henderson, 157 id. 429.) From this class of adjudications cited we may infer that even since the legislation of 1914 wherever the grant of equitable powers to a surrogate may be unconstitutional, or is now doubtful and not express, equitable jurisdiction will be denied to the surrogates. Nevertheless, the grant of jurisdiction to the surrogates over accountings is always held to carry with it such powers, legal and equitable, as are incidental and material to an efficient exercise of the jurisdiction. (Riggs v. Cragg, 89 N. Y. 489; Hyland v. Baxter, 98 id. 616; Matter of Underhill, 117 id. 471, 472; Matter of Wagner, 119 id. 28, 31; Matter of United States Trust Co., 175 id. 304, 309; Sexton v. Sexton, 64 App. Div. 385, 389; *affd.*, 174 N. Y. 510; Matter of Schnabel, 202 id. 134.) To have held otherwise would have been to defeat by judicial construction the obvious intent of the legislature.

That the legislature prior to the new law of 1914 had not yet conferred upon surrogates jurisdiction to decide some controversies which might arise in proceedings before the surrogates to settle the accounts of executors or administrators I thought apparent. For this reason I lately declined jurisdiction in an important matter. (Matter of Watson, 86 Misc. Rep. 595; *affd.*, 165 App. Div. 252.) But the Court of Appeals took a larger view in Matter of Watson of the new legislation than it had ever before taken, and it affirmed the jurisdiction of the surrogates over what had seemed to me a thitherto doubtful class of controversies. (215 N. Y. 209.) In England persons who possess themselves of property of the deceased cannot be made parties to proceedings against the executor. (2 William Exrs. [10th Eng. ed.] 1650.)

It is well known that before 1895 (Laws of 1895, chap. 595) the surrogates had no power to determine any controverted claims against the estate of a deceased person (Tucker v. Tucker,

4 Keyes, 136; McNulty v. Hurd, 72 N. Y. 520; Glacius v. Fogel, 88 id. 434; Riggs v. Crag, 89 id. 479; Fiester v. Shepard, 92 id. 251; Lambert v. Craft, 98 id. 342; Matter of Ryder, 129 id. 640; Matter of Callahan, 152 id. 320, 324; Matter of Miles, 170 id. 75; Matter of Gibson, 176 id. 520, 528; Matter of Martin, 211 id. 328, 330; Dayton Surrogates [3d ed.] 489), although in accounting proceedings by a creditor equity had ordinarily complete jurisdiction to determine the title of the alleged creditor. (Misner v. Strong, 181 N. Y. 163.) Nor had the surrogates until 1895 power to determine the validity of claims of the estate against third persons, even though such third persons were parties to the accounting. (Matter of Underhill, 117 N. Y. 471; Meeks v. Meeks, 122 App. Div. 461, 462.) The surrogates' jurisdiction to determine in accounting proceedings claims of third persons to property claimed by the representatives of deceased persons was prior to 1910 also denied. (Matter of Thompson, 184 N. Y. 36; Matter of Gall, 182 id. 270, 278. Cf. Matter of McLaughlin, 158 App. Div. 952.)

The surrogates' equitable powers over the proceeds of lands sold under a testamentary power and brought into court, for example, were very restricted prior to the year 1914 (Matter of McComb, 117 N. Y. 378, 382), unless there was a conversion effected by the will. (Matter of Caldwell, 188 N. Y. 115.) A surrogate had, until recently, no adequate power to pass upon the validity of a devise. It was, however, then held that where a testator undertook to create a trust in which the real and the personal property were inseparably blended, the surrogate had power to construe such clause and declare the trust invalid and void in so far as it affects the personal property of testator. (Matter of Trotter, 182 N. Y. 465.) It will be remembered that until 1850 the surrogates had no jurisdiction whatever over the accounts of testamentary trustees. (Laws of 1850, chap. 272; Matter of Runk, 200 N. Y. 447; Matter of Hawley, 104 id. 250.)

Under the former law, for the purposes of distribution, the surrogate had an incidental power to construe a will in so far as it was necessary to determine to whom legacies should be paid (*Matter of Verplanck*, 91 N. Y. 439; *Garlock v. Vandevort*, 128 id. 374), but he had no jurisdiction to compel a legatee to restore an overpayment on a legacy (*Matter of Lang*, 144 N. Y. 275), and no general jurisdiction to construe wills. (*Kirk v. McCann*, 117 App. Div. 56, 59.) But whenever the jurisdiction of the surrogate over accountings existed, in a case where complete relief might be had in the Surrogates' Court, the other courts of the state vested with concurrent jurisdiction would decline to exercise their own jurisdiction. (*Wager v. Wager*, 89 N. Y. 161; *Underwood v. Curtis*, 127 id. 523; *Matter of Farrell*, 125 App. Div. 702.)

Thus step by step the jurisdiction of the surrogates to pass upon controverted claims against estates has been enlarged by statute. (*Matter of Thompson*, 184 N. Y. 44.) But even now the mode is very strictly limited. (*Matter of Martin*, 211 N. Y. 328, 330; *Matter of Holzworth*, 166 App. Div. 150, 154; *Matter of Higgins*, 91 Misc. Rep. 387.)

I have now outlined the growth of the equitable jurisdiction of the Surrogates' Courts in proceedings for the settlement of accounts of representatives of estates prior to the year 1914, when the "New Surrogates' Law" went into effect. That law contains more liberal provisions than any other act ever affecting the jurisdiction of the surrogates. By that law (Code Civ. Proc. of 1915, § 2510) the surrogates are given jurisdiction: "To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding * * * in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires." This is a very broad provision and was intended to be such. But as the new Surrogates' Law

of 1914 was enacted under the old Constitution it is doubted, and I think with much reason, whether the legislature had the power to enlarge the equitable jurisdiction of the surrogates of this state. (Const. 1894, § 15, art. VI; *Matter of Bunting*, 98 App. Div. 122, opinion of Hatch, J., concurred in by Justices Van Brunt, Patterson and O'Brien.) The appeal, it is to be observed in *Matter of Bunting*, was dismissed in the Court of Appeals without opinion (182 N. Y. 552). Consequently this decision still confronts the profession of the law whenever the new equitable powers of the surrogates are drawn in question. But, for the reason stated in *Matter of Thornburgh* (72 Misc. Rep. 619, 621), ignoring for the present the constitutional question so serious to the bar and to litigants in this court, let us inquire next what the new legislation portends. Are the surrogates now by virtue of the new legislation possessed of all the equitable powers of the chancellors in these statutory proceedings to determine judicially the accounts of executors and administrators? Has the Surrogate's Court really become a court of equity in proceedings to settle accounts? These are the great questions of the moment. That the new legislation apparently on its face confers most extended equitable powers cannot be denied. But very late decisions of the higher courts have already confined such grants of equitable powers to the few instances particularly specified in subdivisions 1 to 8, section 2510 of the Code of Civil Procedure. (*Matter of Holzworth*, 166 App. Div. 150; *Matter of Ryder*, 129 N. Y. 640, 642.) Whether such an extended and multifarious equitable jurisdiction is expedient has been much doubted. Mr. Throop, when he revised the Surrogates' Law, was of the opinion that the surrogates ought not to be burdened by the trial of too many issues. (See Throop's note to Code Civ. Proc. § 2742.) But whatever his power may be, the surrogate's jurisdiction over accountings still depends upon the presence of the real parties in interest as

only those cited are bound by the decree. (Matter of Killan, 172 N. Y. 547; Matter of Gall, 182 id. 270.)

From the foregoing survey of the jurisdiction of the surrogates in proceedings to settle the accounts of testamentary proceedings it must be apparent that the surrogate is not *in loco cancellarii* and has not the extended equitable powers and jurisdiction of a chancellor. If this is so the surrogates' power to refer the issues arising in such proceedings is wholly governed by the statute, and by the statute only. Section 2536 of the Code of Civil Procedure regulates references by the surrogate. He may appoint a referee "to examine an account rendered; to hear and determine all questions arising upon the settlement of such account which the surrogate has power to determine." I can find in this language no authority to refer part of an account and objections to a referee to hear and determine. While the chancellor undoubtedly had such power, the surrogate has it not.

I come next to the consideration of motion No. 2 for leave to file an additional affidavit in the accounting proceeding. Samuel Riker, Jr., one of the trustees, makes application to have filed in the accounting proceeding an affidavit in which he states that "after the date of the filing of the account of the trustees in this proceeding there was brought to my attention a ledger kept by the said testator, Thomas Rutter, which said ledger contains certain entries which, although obscure and somewhat difficult to understand, seem to indicate that at the time of his death his son, John R. Rutter, since deceased, and J. Edgar T. Rutter were indebted to him in large sums of money." Said affidavit further states the finding of certain papers purporting to be receipts signed by said John R. Rutter and J. Edgar T. Rutter, acknowledging payment or part payment of legacies and containing statements of advancements made to them by the testator. The trustees now move that said affidavit be filed "to the end that the same may be investigated and that the facts disclosed

upon such further investigation shall be considered in directing any distribution of the estate under the terms of the will."

If the affidavit were filed, and if the court were inclined to make such an investigation, all parties interested in the accounting proceeding would be entitled to notice of the application. The only parties who actually received notice of this motion are those who have appeared by attorney. Those parties required to be cited upon the accounting and who did not appear in the proceeding by attorney have received no notice of this application. Proper and orderly practice would seem to require the trustees to file an amended or supplemental account setting forth the additional facts they desire to have appear in the record. An issue could then be raised by way of objections in the usual manner.

This is not a case of construction of a will, where an executor or trustee may ask for directions from the court. This is a matter where the trustees themselves are required to make a decision based upon their own judgment as to whether or not an error was made in the statement of advancements. Unless the trustees make such a decision, there is no way in which an issue can properly be presented to the court. This court has no power to instruct trustees in the matter resting in their judgment or discretion.

Aside from the question of practice, it appears that the trustees are precluded from now raising the question of the amount of these advancements. In Schedule II of the account of the executors and trustees filed in this court June 14, 1897, among "the debts and claims owing to the said decedent at the time of his death collected by us as executors and the amounts realized therefrom" is the following: "Claim against J. Edgar T. Rutter for one thousand seven hundred and ninety-seven dollars and sixty-three cents advanced to him by Thomas Rutter in sundry amounts at sundry times between the year 1890 and the year 1895, both years inclusive, collected on 25 November,

1895, \$1,797.63." And also: "Claim against John R. Rutter for seven thousand nine hundred and fifty-eight dollars and sixty-eight cents, amount of balance to his debit, entered in the ledger of Thomas Rutter as of 3 May, 1895, the date of the death of Thomas Rutter, collected or settled as follows: \$7,958.68." The decree of November 12, 1897, judicially settled the account of 1897 as filed, and discharged the executors and trustees as to all matters embraced therein. Section 2738 of the Code of Civil Procedure (former § 2733), provides that advancements must be adjusted by a decree for distribution in the Surrogate's Court. Such an adjustment having been made by the decree of November 12, 1897, the matter of advancements must now be regarded as finally settled. (Matter of Elting, 93 App. Div. 516.)

It will also be noted that the executors and trustees in their account of 1897 stated the total amount of advancements to the two sons of the testator down to the time of testator's death. The judicial settlement of said account, therefore, bars the executors and trustees from questioning in a new accounting proceeding the correctness of their previous statement of advancements. (Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425.) In my opinion the application of the trustees to file the additional affidavit should at this stage be denied.

I next approach motion No. 1, to wit, the application of Beatrice R. Moore for delivery of part of her share of the estate. This application is made under sections 2689 and 2690 of the Code of Civil Procedure (former §§ 2804 and 2805). The trustees contend that this court has no jurisdiction to make the order applied for during the pendency of the accounting proceeding. It is said that the pending accounting proceeding has the same parties and involves the same issues as the application under consideration, and that therefore this application should be denied and Mrs. Moore should be remitted for relief to the accounting proceeding in which she can admittedly obtain the

very relief sought in her separate application for delivery of part of her share of the estate.

Only one important adjudication is cited to me on the question of practice raised by the trustees. In *Matter of Ockershausen* (10 N. Y. Supp. 928) the contestant in a pending accounting proceeding applied to the surrogate for an order of partial distribution. The surrogate granted the order. Upon appeal to the General Term it was held that sections 2617 and 2618 of the Code, as it existed in 1890 (changed in 1893 to section 2722, which was repealed in 1914), gave power to the surrogate to make the order of partial distribution. It was urged in the *Ockershausen* case that the pendency of the accounting proceeding was a bar to the granting of an order for partial distribution under the other sections of the Code above mentioned. The analogy therefore between that case and the situation in the estate before me is very close. In the *Ockershausen* case the court said: "The remedy which a distributee has under these sections is not within the principle that two proceedings are pending for the same thing, and that the first in time is first in right. The partial distribution can be made while the contest over items which affect the general settlements is going on. The surrogate will not order a distribution so as to make the executor liable for the same money upon final accounting. If the facts are stated correctly in the papers the surrogate left more than enough in the executor's hands to cover all liabilities." The order of the surrogate was therefore affirmed. This case is, therefore, an authority for a partial distribution in this matter.

I have examined all the cases cited by the trustees and by the promovent, and besides the *Ockershausen* case the only other cases which seem helpful are *Matter of Hunt* (110 App. Div. 544) and *Matter of McQuade* (157 id. 344). Both of these cases are, however, distinguishable from the case at bar, and in my opinion they are not authoritative on this motion herein.

It is urged by the trustees that if the technical objection to the partial distribution be determined in favor of the promovent, and, even if the matter rested in discretion, the order applied for should not be made because of the objections already filed to the account, because further objections may be filed and because of the difficulties of transferring the securities to the petitioner or paying her in cash.

All legacies have been paid as well as all debts and administration expenses down to the time of filing the account in 1914. If the objections filed or to be filed are sustained the share of the petitioner will be increased. If the objections are overruled her share remains practically the same. If the trustees were permitted to raise the question of further indebtedness to the estate by J. Edgar T. Rutter and John R. Rutter on account of advancements that were not taken into consideration in the account of 1897, and if it were determined that further deductions should be made from the shares of Mrs. Moore and J. Edgar T. Rutter, such deduction from the share of Mrs. Moore would still leave the value of her interest well over \$100,000. According to the trustees' figures Mrs. Moore's interest in the estate is worth about \$114,000. There is no possible way by which harm could come to the trustees if I were to direct that they pay to Mrs. Moore on account of her interest \$25,000.

There is some difficulty, however, in the way of such an order owing to the fact that the trustees have placed their own valuations upon the securities comprising the bulk of the estate. They have set aside and made a division of the several securities that are to be paid to the three children of the testator and to Mrs. Moore. A transfer of securities cannot be directed because no consent to a distribution in kind has been filed and no appraisal has been had pursuant to section 2736 of the Code of Civil Procedure. If a partial distribution were to be ordered the decree would necessarily have to direct the trustees to pay

in cash. This would necessitate the sale of some of the securities. That this difficulty is not a serious one is evident from the fact that, as the accounting proceeding now stands, the decree therein cannot direct delivery of the securities. Such delivery could only be directed upon filing the consents and upon the appraisal provided for by section 2736 of the Code of Civil Procedure. In my opinion the application for a partial delivery should be granted by directing payment to the extent of \$25,000 to the petitioner.

I will now go back to motion No. 3 for the usual order of reference of the objections interposed to the final accounts. Some oral testimony will be required, as, for instance, testimony as to the reasonableness of the amount of \$2,552.85 paid to the attorney for the trustees according to Schedule VIII of the account and objected to in paragraph VIII of the objections filed by Beatrice R. Moore. Further testimony will in all probability be required to substantiate payments amounting to \$486 set forth in Schedule XXV of the account and objected to in paragraph XII of the objections filed by Beatrice R. Moore. Testimony will also be required on several other minor objections interposed by said Beatrice R. Moore. The several accounts should be consolidated in the usual way. Thereupon I shall direct that an order of reference be made to David B. Ogden, Esq., counselor at law, to hear and determine all questions arising upon the settlement of such accounts. This seems to me to be a just and proper disposition of the motion to refer. Let the various orders be settled, on the usual notice, in conformity with this opinion.

Decreed accordingly.

Matter of the Petition of ROCKIE BELLE JUDSON and HAROLD J. SCHAPER to Prove the Last Will and Testament of CHARLES S. SARGENT, late of the County of Kings, Deceased.

(Surrogate's Court, Kings County, October, 1915.)

EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS—WHEN INSTRUMENT PURPORTING TO BE A LAST WILL AND TESTAMENT DENIED PROBATE—WHEN RIGHT OF WIDOW TO LETTERS ABSOLUTE.

Where there is an executor or administrator whose right to letters appears and who asserts such right no temporary administrator can be appointed nor does the pendency of an appeal from the decree which recognizes such right afford any reason for delay in the granting of letters to such executor or administrator.

Where an instrument purporting to be a last will and testament is denied probate, the right of the decedent's widow to letters of general administration upon his estate is absolute.

PROCEEDING upon the probate of a will. Application for the appointment of a temporary administrator.

Andrew F. McNickle, for applicants, proponents.

Frank X. McCaffry, for contestant, objectant.

KETCHAM, S.— This is an application for the appointment of a temporary administrator of the decedent.

A paper propounded as the will of said decedent has been denied probate, and an administrator of his estate has been appointed and has received letters of general administration.

The only authority in the books of this state which might suggest any merit in the present application is in the opinion of Mr. Justice BENEDICT in *People ex rel. Scofield v. Surrogate's Court* (N. Y. L. J. May 28, 1915).

In the case cited a writ of prohibition was sought to prevent

the surrogate of Kings county from granting letters of administration upon the estate of an intestate to one who had been duly adjudicated to be his widow by a judgment of the Supreme Court in an action in which all proper parties were impleaded. Before the writ was asked for, and at a time while appeal from the judgment aforesaid was pending, the surrogate had decided that by virtue of the adjudication in her favor the applicant was entitled to the letters.

The opinion of the learned justice was in full as follows:

"The application for an absolute writ of prohibition, based upon the alternative writ issued herein and dated the 14th day of May, 1915, directed to the Surrogate's Court of Kings County and Hon. Herbert T. Ketcham, Surrogate of Kings County, and Jean Winifred Fitzsimmons, claiming to be the widow of Charles W. Schofield, deceased, must be denied. While it seems quite manifest that it would have comported more with the proprieties that a stranger should have been appointed temporary administrator of the estate of the decedent, under section 2596 of the Civil Code, rather than that the alleged widow whose rights are being contested should be permitted pending appeal to secure possession of the entire assets of the estate, consisting of dividend-paying or interest-bearing securities, by means of limited letters of administration issued under section 2557, when the sole purpose to be served will be to enable her to sell the securities at a loss of interest due to such sale, yet this court is without power under the circumstances to interfere. The discretion is vested in the surrogate, and he had jurisdiction to act upon the application. The Supreme Court cannot control the surrogate in matters within the limits of his jurisdiction, which rests in his discretion. The application is denied, without costs."

A judicial declaration that it would be proper for a surrogate to appoint a temporary administrator in a case where a person legally entitled to general administration was demanding her

rights is significant. If it must be followed it carries with it a small revolution. Of course, the expression was *obiter dictum*. It was not essential to the decision, for prohibition was refused, and it thus becomes only an unnecessary discovery of a personal conviction.

But under the graces of life which teach respect by one court for the judicial conduct and views of another, a gratuitous dictum must receive the utmost attention in order that, on the one hand, it may be accepted if it accords with reason or, on the other, that care be had lest under the shadow of a great name an evil be wrought in the law.

Though in the opinion quoted, *supra*, there appears an impulse to characterize the action of another court not only as error, but as a departure "from the proprieties," it still remains the happy duty of this court loyally to search and to hope for guidance if it may be found in the language of the learned justice.

There is no such thing as the appointment of a temporary administrator when there is an executor or administrator whose right to letters appears and who asserts such right, nor does the pendency of an appeal from the decree which recognizes such right afford any reason for delay in the granting of letters to such executor or administrator. There is no scope for the exercise of any discretion by the surrogate, when a widow asks for administration and upon proof is found to have been the true and honorable wife of the intestate. In such case she has the absolute right to the office. If there arises need to withhold or take away her right because of unfitness or to restrain her in the conduct of her office, ample resources are afforded to an aggrieved party in the Surrogate's Court (Code Civ. Pro., § 2490, subds. 4, 5, 11; *id.* §§ 2557, 2560, 2564, 2565, 2566, 2569, 2570, 2574), as well as in the equity jurisdiction of the Supreme Court.

This right, dependent only upon the fact which declares and

supports it, is preserved in the only statute under which temporary administration may be had. (Code Civ. Pro., § 2596.) That section provides that a temporary administrator of the estate of one deceased may be appointed:

“1. When for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will.”

Other than this, there is no provision in the law, statutory or otherwise, affecting the appointment of a temporary administrator in the case of one known to have died, nor is it possible for the surrogate to grant temporary administration unless in a case defined and provided for in the section last quoted.

The act of a surrogate in refusing to appoint a temporary administrator in a case where the administrator ordained by law is known and is demanding appointment, so far from a failure to “comport with the proprieties,” is the only act which he can lawfully perform in the premises. His duty has nothing to do with “proprieties” if “proprieties” mean anything other than duty. The law is that he must appoint the administrator in chief.

In this case the adjudication has been reached that the decedent has died intestate, just as in the case cited it had been adjudged that the person seeking administration was the intestate's widow. In this case, as in that, every fact essential to the right of the applicant for administration appears by the conclusive effect of a final judgment. In this case, as in that, the applicant has been awarded her right upon proper procedure.

The application must be denied. If pending the appeal any restraint or regulation of the conduct of the administratrix becomes necessary, resort may be had to the provisions on the subject well known to those who know the law.

Application denied.

Matter of the Judicial Settlement of the Account of LESTER C. GILMAN, as Executor of the Last Will and Testament of THEOPHILUS GILMAN, Deceased.*

(*Surrogate's Court, Kings County, October, 1915.*)

GIFTS †—OF CERTAIN SHARES OF CORPORATE STOCK—NO EVIDENCE OF DELIVERY—EXECUTORS AND ADMINISTRATORS.

Where a claim against an estate is based on a personal transaction between decedent and claimant, clear and convincing proof is needed.

Where a father declares he has given certain shares of corporate stock to his son, who is also his executor, and thereafter throughout his life keeps such property in his own hands taking to his own use all the income thereof, and after his decease the certificate of stock upon which was indorsed the usual assignment and power of attorney signed in blank by decedent is surrendered and a new certificate for a like number of shares issued to the executor in his own name personally, and there is no evidence as to whether the original certificate at the time of its surrender was held by the executor as his own property or as executor, the presumption is that decedent remained the owner of the stock at his death and the son has not affirmatively established that there was a delivery to him of the stock with intent to effect a gift.

PROCEEDING upon the judicial settlement of the account of an executor.

Brush & Crawford (John J. Crawford, of counsel), for executor.

David Joyce, for contestant, Mabel R. Gilman.

KETCHAM, S.—The executor claims that the decedent, his father, gave to him 100 shares of certain stock.

Two witnesses, who are regarded by the court as trustworthy, intelligent and moderate, testified to repeated declarations by

* See 85 Misc. Rep. 651.—[REPR.]

† See Note Vol. II, p. 247.

the father that he "had given" to his son the stock in question.

The decedent, prior to these declarations and during his lifetime thereafter, owned many other shares of the same stock, upon which he semi-annually collected dividends. At all times after he acquired the 100 shares involved in the present dispute they yielded the same dividends as were payable upon the other shares of stock and the decedent semi-annually received such dividends.

The decedent died on August 26, 1912, and on January 29, 1913, the certificate for this stock was surrendered to the company which had issued it, and in place thereof a new certificate for a like number of shares was issued to the executor in his own name personally. At that time there was indorsed upon the original certificate the usual assignment and power of attorney which had been signed in blank by the decedent.

The certificate issued to the executor personally was produced upon the trial, obviously by the executor individually. The delivery by the executor to the company of the original certificate contains no evidence as to whether it was then in his hands as his own or as the representative of the estate.

Where a claim against an estate is based upon a personal transaction between the decedent and the claimant, clear and convincing proof is needed.

The presumption with which this inquiry must start is that the decedent, once the owner of the security in question, remained the owner thereof at his death. There is no direct proof as to the delivery of the stock by the father to the son. Nothing but a balanced negative is afforded by the proffer in evidence of the now existing certificate or by the transaction in which such certificate was issued in exchange for the original.

The only fact which may tend to impair the presumption that the stock was owned by the decedent at death is that he frequently said that he had given it to his son. The phrase "I have given" is undoubtedly capable of a meaning which would

embrace all the elements of an effectual gift; but the value of the words, whether grammatical or legal, is not the only evidence to be regarded. Where the expression was used colloquially, the personality of the declarant, his relation to the alleged donee, his relation to the subject-matter of the gift, the conduct of either of the parties with respect to the property in question either at the time of the declaration or during the lifetime thereafter of the alleged donor, and all the circumstances which may enlarge, qualify or define the declaration must be considered in order that a just conclusion may result as to the significance which the words assumed in the minds of the parties.

Where a parent declares that he has given personal property to a son and at the time of the declaration and thereafter throughout his life keeps the property in his own hands and takes to his own use all the income which it produces, his speech is characterized by his conduct; and his statement, thus interpreted, can only be: "I have given my son the stock which I keep in my own possession and upon which I am receiving and intend so long as I live to receive the dividends to my own use."

Under the rigor of the rule which requires from the claimant clear and convincing proof in support of his demand, he has not affirmatively established that there was a delivery to him with the intent to effect a gift.

The account must be settled accordingly.

Decreed accordingly.

Matter of the Appraisal under the Transfer Tax Acts of the
Property of JAMES BOYLE, Deceased.

(Surrogate's Court, Kings County, October, 1915.)

**TAXES—TRANSFER TAX—WHEN AFFIDAVIT OF ADMINISTRATOR MISSTATED
MARKET VALUE OF CERTAIN STOCK—ASSESSMENT OF TAX—WHEN ERROR
MAY BE CORRECTED.**

Where it is conceded that the affidavit of the administrator in a transfer tax proceeding inadvertently misstated the market value of certain stock belonging to the estate, and that following the report of the appraiser based on such statement the tax was assessed as if the stock was of its fair market value instead of its true value, the error may be corrected even after the lapse of two years from the making of the order assessing the tax.

APPEAL from an order assessing and fixing the transfer tax.

S. M. & D. E. Meeker, for motion.

Marcus B. Campbell, for state comptroller.

KETCHAM, S.—Relief is asked in behalf of the administrator against an order made in 1910 fixing the tax upon the transfer of the property of the decedent. Objection is made by the comptroller that the motion cannot be entertained after the lapse of two years from the making of the order.

The affidavit of the administrator in the transfer tax proceeding inadvertently stated that the market value of 114 shares of Manufacturers' National Bank stock, found in the estate, par value 30 at \$412, was \$47,310, and the report of the appraiser was based on this statement, while in fact the market value of this stock was \$30 at 415 per cent. Upon this statement the tax was assessed as if the stock described was of the value of \$47,310, instead of the true value of \$14,193.

The result was wrong and the impulse of the law should be to correct it, if possible. To leave the record as it is would leave the parties subject to a tax originally unlawful and would leave the state in the oppressive attitude towards the citizen.

Adjudications are not to be altered lightly, but while a judgment is a solemn thing an injustice is more solemn.

This motion must prevail if the confessed infirmity in the record was the result of a clerical error. (Code Civ. Pro., § 2490, subd. 6.)

The statement upon which the appraiser's report and the surrogate's order were based is conceded to have been a mistake, and, of course, it was a clerical mistake, at least on the part of the affiant. Contrary to the fact there were introduced into the affidavit of value the figures "412" instead of the figures "415 per cent."

This case falls within *Matter of O'Reilly*, decided in this court (Surr. Dec. Mar. 26, 1909). There a decree entered upon the settlement of accounts was opened, vacated and set aside and the executor allowed to file a new account upon motion made four years after the making of the decree in the accounting. This decision was affirmed by the Appellate Division (136 App. Div. 891), and by the Court of Appeals (197 N. Y. 551).

The only grounds upon which relief was granted were that the accountant had in reliance upon information received by him from his own agents declared in his former account that he was chargeable with certain large sums specified, while in truth the sums so specified greatly exceeded the actual amounts with which he was properly chargeable.

The only meaning of the case is that a clerical error by a party in his representation to a court upon the adoption of which an inaccurate judgment has been made is among the errors which the statute recognizes as the basis for relief even after the expiration of two years.

The order, so far as it depends upon a misstatement of the

value of the stock in question, should be modified either by a direct resettlement or upon a reference to the appraiser, as the comptroller may elect.

Order modified.

Matter of the Transfer Tax upon the Estate of JOHN KLEIN,
Deceased.

(*Surrogate's Court, Bronx County, November, 1915.*)

GIFTS *—FUNDS IN BANK—WHAT IS A VALID GIFT INTER VIVOS—EVIDENCE.

At the time of the death of decedent he had on deposit money in savings bank accounts in the name of "John Klein for daughter Maria A," "John Klein for daughter Mary A," and "John Klein for daughter Elizabeth M." The bank books at the time of his death were in the possession of the decedent and there was no evidence to justify a finding that they had ever been in the possession of either of the daughters.

The testimony established that the accounts were made up of moneys that were given to the daughters at different times, over a long period of years by the decedent, that were subsequently deposited in the above mentioned accounts by the decedent at the request of the daughters and that were not given in contemplation of death.

Held, that there was a valid gift *inter vivos* of the said moneys by the father to the respective daughters and that the mere fact that the father in depositing the fund which he had presented to his daughters, and which they had turned over to him to deposit for them, did so in the form which if unexplained would constitute a revocable trust, did not in any way deprive said daughters of their ownership; that their title to the same did not arise, nor was there any transfer to them by reason of the death of the decedent; that the transfer from the decedent to them took place when he made the gifts to them, and nothing that he could do thereafter could deprive them of the right which they had to the moneys which were the subjects of the gifts; that the handing back of the accumulated gifts by the donees to the donor did not affect the gift.

APPEAL from an order fixing the transfer tax.

* See Note Vol. II, p. 247.

Adolph E. Gutsell, for petitioner.

John Boyle, for respondent.

SCHULZ, S.— This is an appeal by the administratrix of the goods, chattels and credits of the decedent from an order entered upon the report of a transfer tax appraiser. The grounds of error urged are six in number.

Subsequently to the service of the notice of appeal, a stipulation was entered into to the effect that the said order be vacated and that the report of the appraiser be remitted to him for amendment. The proposed amendments are that the fair market value of the property No. 2167 Bathgate avenue, borough of The Bronx, city of New York, at the date of decedent's death be fixed at \$9,750, and that the transfer of two items, one of \$150, and one of \$50 in the stipulation mentioned be reported as not taxable in this proceeding. The stipulation also provided for the withdrawal of the appeal in so far as the same was taken from the finding of value by the appraiser of said real estate and the inclusion of the items heretofore mentioned among the taxable property of the decedent, thus limiting the matter before me to three alleged errors of the appraiser.

At the time of the death of the decedent he had on deposit in a savings bank in the city of New York the sum of \$1,899.80 in the name of John Klein (the decedent) for daughter, Maria A. In a second savings bank he had a deposit in the sum of \$162.62 in the name of John Klein (the decedent) for daughter Mary A., and in this second savings bank he had a second deposit in the sum of \$162.62 in the name of John Klein (the decedent) for daughter, Elizabeth M.

The above statement of the forms of said accounts is taken from the schedules, the bank books not being in evidence. From some of the testimony it would appear that the title of the accounts contained the words "in trust."

The decedent left him surviving his wife, Maria Klein, and two daughters, Maria A. Iffland and Elizabeth M. Iffland. Counsel for the state comptroller argues that the form of the deposit creates a revocable tentative trust during the lifetime of the decedent; that he could have withdrawn the funds deposited at any time for his own use and that the transfer took place at the death of the decedent; and hence the items in question must be included among his taxable property.

The evidence indicates that the savings bank books were not delivered to the daughters, and at the time of the death were in the possession of the decedent. There is no evidence which would justify a finding that they had ever been in the possession of either of the daughters.

If there had been nothing before the appraiser but the bank books indicating a deposit of moneys in the form stated, his contention would be directly in line with the opinion in *Matter of Totten* (179 N. Y. 112), where the rule as to deposits of this character was clearly and decisively stated as follows: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass-book, or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." Cited with approval in many cases among which are *Matter of United States Trust Co.* (117 App. Div. 178; *affd.*, 189 N. Y. 500); *Stockert v. Dry Dock Savings Institution* (155 App. Div. 123); *Matter of Davis* (119 *id.* 35); *Warburton Ave. Baptist Church v. Clark* (158 *id.* 230).

The contention of the appellant, however, is that the money

which was the subject of the deposits was not the property of the decedent when he deposited it, but was then the property of his two daughters, because, prior to the date of deposit, the decedent had by valid and completed gifts presented the daughters with the same.

The testimony is that the two daughters of the decedent had small banks at home and that the testator used to put various amounts in these banks, and that at Christmas times and upon their birthdays he would give them money or deposit it in these banks; that the banks belonged to the daughters, respectively, and that thereafter, from time to time as the amounts in the small banks grew larger, the daughters would hand their father the money to be deposited for them, and that the item of \$162.62 deposited in the one savings bank for his daughter Maria A., and a similar deposit in the same bank for his daughter Elizabeth M., were moneys which the decedent had actually given to his daughters in the manner indicated and which they had handed to him to deposit for them. The testimony of one of the daughters is that she gave back the money to her father to deposit for her, and that some of this money she received from her father for work done for him. She also states that the sum of \$1,899.80 was made up in the same way of presents given to her by her father over a period of years which she thereafter, from time to time, gave to her father to deposit for her; that he had first started the small account for her and later on started the larger account and that none of the funds deposited in any of the three accounts were deposited by her father in the first instance, but in each case the sums deposited were made up of amounts that had been actually given to her by her father and which had been given to her sister by her father and then returned to the father by her and her sister to take care of for them until they were married, respectively. It also appears that the one daughter upon being married received a larger account theretofore held in trust for her by her father. The

daughter Maria A. had been married in June, 1914, and at the time of the death of the decedent the moneys had not as yet been transferred or paid to her, nor had the smaller of the two accounts been paid to her sister. This circumstance, however, is not controlling as showing the existence and revocability of the trust. (Matter of Pierce, 132 App. Div. 465.)

I think it is evident that if the testimony of the witnesses is true as to the facts detailed, then there was a valid gift *inter vivos* (Lewis v. Jones, 50 Barb. 645, 651; Matter of Birdsall, 22 Misc. Rep. 180; Gannon v. McGuire, 160 N. Y. 476), and the mere fact that the father, in depositing the fund which he had presented to his daughters and which they had turned over to him to deposit for them, did so in a form which, if unexplained, would constitute a revocable and tentative trust, does not in any way deprive them of their ownership. Their title to the same does not arise, nor is there any transfer to them, by reason of the death of the decedent. The transfer from the decedent to them took place when he made the gifts to them, and nothing that he could do thereafter could deprive them of the right which they had to the moneys which were the subject of the gifts respectively. The handing back of the accumulated gifts by the donees to the donor under the conditions stated did not affect the gift. (Gannon v. McGuire, *supra*.)

There is testimony by the administratrix to the effect that the larger deposit was to be given to the daughter when she married; this may have led the transfer tax appraiser to conclude that the items in question were taxable, but I think when all of the testimony is examined the preponderance is clearly in favor of the contention made by the appellant. The evidence as given is not on its face improbable; the amount involved is small and I cannot assume that the testimony as given by the mother and the daughter is absolutely false. On the contrary I think the surrounding circumstances are such as to indicate that the witnesses in question were telling the truth.

If the money in question were the aggregate amounts of gifts *inter vivos*, which in my opinion they were, they might still be the subject of taxation if made in contemplation of the death of the donor. (Tax Law, Laws of 1909, chap. 62, constituting Consol. Laws, chap 60, art. 10, § 220, subd. 4; Matter of Bird-sall, *supra*; Matter of Palmer, 117 App. Div. 360.) The uncontradicted testimony, however, is that the making of the gifts in question extended over a long period of years, were not made while the donor was ill, or at or near the time of his death. I can find no testimony warranting me in finding that the contrary was the fact.

Under the circumstances, I reach the conclusion that the item of \$1,899.80 on deposit in the Emigrant Industrial Savings Bank in the form as above indicated was the property of Maria A. Iffland, and the two items of \$162.62 each deposited in the Bowery Savings Bank were the property of Maria A. Iffland and Elizabeth Iffland, respectively, and consisted of gifts made by the decedent to them during his lifetime and thereafter handed by them to him from time to time to be deposited for them.

The order is therefore reversed as to the three items mentioned and the report is remitted to the appraiser for compliance with the terms of the stipulation as hereinbefore set forth, and for correction as indicated.

Order reversed and report remitted to appraiser.

Matter of the Application for the Probate of the Last Will and Testament of ELIZABETH CONNELL, Deceased.

(Surrogate's Court, New York County, November, 1915.)

EXECUTORS AND ADMINISTRATORS—WHO ENTITLED TO ANCILLARY LETTERS IN THIS STATE—WHO MAY APPLY FOR REVOCATION OF—WILLS.

The only persons entitled to ancillary letters in this state are the persons entitled to the possession, in the domiciliary state, of the personal estate of the decedent.

Local next of kin are not entitled to notice of an application for ancillary letters, but for protection they should resort to the courts of the last domicile of decedent where the last will of their testatrix is acted on by public authority.

As the local next of kin are not entitled to ancillary letters and not entitled to notice of an application therefor, they cannot apply for the revocation of such letters on the ground that the papers on which such letters were granted are defective.

APPLICATION for revocation of ancillary letters.

Roger Foster, for petitioner.

Geller, Rolston & Horan, for Farmers' Loan & Trust Company, opposed.

FOWLER, S.—In accordance with the directions contained in my decision in August, 1911, an order was entered appointing David B. Ogden, Esq., counsellor-at-law, a referee to take evidence upon the disputed question of decedent's last domicile, and to report the same to this court with his opinion. A commission was issued to take the testimony of witnesses in Canada, and such testimony is now attached to the referee's report. It appears that the learned referee took the testimony of witnesses who reside in this city and who were acquainted with the testa-

trix while she was a resident of this state. He has found that the decedent at the time of her death had her domicile in Canada. It seems to me, from the evidence, that his conclusion is correct. The facts upon which he bases his conclusion are about as follows: The testatrix was born in Canada and lived there until she arrived at the age of maturity. This then was her domicile of origin. The evidence is not clear as to the date upon which she left Canada, but the record shows that in the year 1870 she opened an account in the Dry Dock Savings Institution in this city, and that she was engaged as a nurse in a hospital here in 1878. She married a resident of this state, and continued to reside here until August 15, 1908. Immediately prior to the latter date she lived in a furnished room in this city and was obliged to leave because the house at which she had lived was about to be torn down. She took her personal belongings and went to Canada in August, 1908, and remained there until June 26, 1910, the date of her death. In Canada she lived with her nephews and assisted in the housework. There is some evidence to the effect that she expressed her intention of residing in Canada during the remainder of her life and that she endeavored to make arrangements for the removal to that country of a tombstone she had erected in a cemetery in Brooklyn.

When this cause was on in this court before, I was under the impression that the Canadian will of the deceased was what is called "allographic," but it is not so; the will was what is known as a nuncupative or "notarial" will. It was made in lower Canada in conformity with the law of the province of Quebec. Ancillary letters were, after the death of Elizabeth Connell, issued out of this court by direction of my predecessor. The regularity of these ancillary letters is now challenged, and an original probate is sought by petitioner on the ground that the last domicile of Elizabeth Connell was in our county and not in the province of Quebec, where she died, and on the further ground that the Code in force did not authorize the issuance of

ancillary letters to the Farmers' Loan and Trust Company on the Canadian document.

This proceeding was commenced in 1911, and its disposition, therefore, is to be governed by the provisions of the Code as they existed prior to the amendment effected by chapter 443 of the Laws of 1914. Section 2695 of that Code provided that where a will of personal property, made by a nonresident has been admitted to probate within the foreign country, where it was executed, "or where the testator resided at the time of his death; the surrogate's court * * * must, upon an application made as prescribed in this article * * * issue thereupon ancillary letters testamentary." Section 2698 provided that upon the presentation of a petition for such letters "the surrogate must ascertain, to his satisfaction, whether any creditors, or persons claiming to be creditors of the decedent, reside within the State," and, if so, such creditors must be cited, unless they waive the issuance and service of citation. Section 2699 provided that upon the return of the citation, "the surrogate must ascertain * * * the amount of debts due * * * from the decedent to residents of the State," and as a condition of awarding letters the petitioner, or the person to whom the letters may be awarded, shall qualify by giving a bond for a sum not exceeding twice the amount of the debts due local creditors. Section 2696 provided that such ancillary letters shall be granted to the person "entitled to the possession in the foreign country of the personal estate of such decedent."

It is apparent, from these sections of the Code cited, that the only person entitled to ancillary letters in this state is the person entitled to the possession in the domiciliary state of the personal estate of the decedent. The person entitled to the personal property of the testatrix in the province of Quebec, where she died and where her will was probated, was the executor designated in her will and who subsequently qualified in accordance with the laws of the province. Neither of the peti-

tioners, as next of kin of the testatrix, is entitled to ancillary letters in this state. They were not entitled to notice of the application for ancillary letters as the Code expressly provides that such notice shall only be given to creditors of the decedent in this state. As they were not entitled to notice at the time the application was made for ancillary letters in this state, and would have no right to intervene at that time for the purpose of preventing the issuance of such letters, they have no right now to apply for the revocation of the letters upon the ground that the papers upon which such letters were granted by this court did not strictly conform to the requirement of section 45 of the Decedent Estate Law. It is not necessary, perhaps, to decide more than this at the present time.

It is, however, asserted on behalf of the petitioner that the decree granting ancillary letters should be set aside because of defects in the authentication of the papers on which the ancillary letters were issued, in that the papers do not conform to section 2695, Code of Civil Procedure, and section 45, Decedent Estate Law, and, further, because they do not show that the will in question has been admitted to probate in the dominion of Canada. Now, the sections of the Code in relation to ancillary letters are designed to protect the interests of local creditors and not the interests of the next of kin living in this county. The latter should resort to the courts of the last domicile of testatrix for the protection of their interests or the enforcement of their rights. It seems to me, therefore, that it is not necessary upon this application for the court to inquire into the sufficiency of the authentication of the records upon which the ancillary letters were heretofore granted by this court. But I will not rest here, as there seems to me to be some misapprehension not only about the object of our law in regard to authentication of probates, but also a misapprehension regarding the foreign law of wills and probate.

A person, even if a resident of our county, may make a will

according to the law of a temporary domicile, and the principle "*locus regit actum*" will then apply. In the French law and the law of the province of Quebec, founded on French law, there are three kinds of wills known as: holographic wills, wills *par acte public*, and "mystic wills." In this life information is sometimes obtained in very ordinary channels. There is a very good description of a mystic will in a charming French romance by André Theuriet, entitled "L'Oncle Scipion," not, I think, translated into English. The French romancers, like the English novelists, are very apt to make a recondite point of law the basis of their plots. Warren, it will be recalled, in the famous "Ten Thousand a Year," so familiar to our lawyers, made his romance turn on the mysteries of a base fee.

The testatrix here did not make a "mystic" will, but a will *par acte public*, sometimes called a "notarial will." In French law there are no proceedings precisely corresponding to our probate. A testamentary succession is said to be "*ouverte*" by the death of the testatrix. Then there must be a formal acceptance of the inheritance. All proceedings relating to the estate are conducted at the place of opening ("*ouverture*") of the succession, which determines what court has jurisdiction of disputes. A French will itself is lodged with the appropriate notary, who is a public functionary, charged with the duty of keeping last testaments. A notary is an officer of the civil law. In England he obtains his faculty from the Court of Faculties. The judge of the Provincial Courts of Canterbury and York is now, I believe, *ex officio*, Master of Faculties. The acceptance of the inheritance in French law is a very important act, and when duly given is quite equivalent, I think, to a probate or publication of the will in the custody of the notary.

It would be somewhat provincial for us to suppose that in a foreign country there can be found institutions precisely similar to our own. While there may be no such thing in a foreign country as a probate, nevertheless there is always some act which

is equivalent. If this point were now necessarily before me here I should elaborate it. Meanwhile I am inclined to think that the papers on which the ancillary letters were issued were quite sufficient in form and substance. But this is not now necessary to adjudicate, for the reasons before stated. Those reasons *per se* are sufficient to necessitate the denial of the application for the probate of the Canadian will of testatrix as well as the application for the revocation of the ancillary letters heretofore issued out of this court.

Decreed accordingly.

Matter of the Petition of NORBERT J. KENNY, to Render and Settle His Account as Executor of the Last Will and Testament of HUGH KENNY, Deceased.

(*Surrogate's Court, Kings County, November, 1915.*)

EXECUTORS AND ADMINISTRATORS—PETITION FOR JUDICIAL SETTLEMENT OF ACCOUNTS—WHEN BANK NOT NECESSARY PARTY TO PROCEEDING—WHEN MOTION TO DISMISS GRANTED; PARTIES—TO PROCEEDINGS FOR JUDICIAL SETTLEMENT OF ACCOUNTS OF EXECUTOR—CODE CIV. PRO., §§ 2510, 2736.

Where, though in the petition for the judicial settlement of the accounts of an executor a bank is described as a depository of funds alleged to belong to the decedent, the statement in the account makes it clear that at the death of decedent the bank was only a debtor either of decedent or of the person named as a possible beneficiary of the deposit, the bank is not a necessary party to the proceeding, and where in accordance with the allegations and prayer of the petition the bank was served with a citation, its motion to dismiss the proceeding as to itself, for lack of jurisdiction, will be granted.

The effect of section 2510 of the Code of Civil Procedure considered, and held to show no intention to enlarge the class of persons who may be parties to a proceeding for the judicial settlement of the accounts of an executor as provided by section 2736 of said Code.

PROCEEDINGS upon the judicial settlement of the accounts of an executor.

Snedeker & Snedeker, for Brooklyn Savings Bank.

Francis J. Sullivan, for accountant.

KETCHAM, S.— This is a motion made by the Brooklyn Savings Bank that as to itself this proceeding be dismissed for lack of jurisdiction.

The accountant, in his petition for the settlement of his account, alleges that the bank is a person interested in this proceeding, and in that behalf describes it as “ a depository of funds alleged to belong to the decedent.” In accordance with these allegations and the prayer of the petition, the citation in this proceeding was addressed to the bank, and has been served.

The account contains the following:

“ Decedent left a bank-account with the Brooklyn Savings Bank, in his own name in trust for Rita Marie Bennett, his said grand-daughter, and the pass-book thereof came into my custody from the possession of decedent upon his death on April 15th, 1914.”

The Code directs that upon a settlement of the account of an executor there must be cited certain persons, described by classes. (Code Civ. Pro. § 2730.) It is to be confessed that this is not equivalent to a direction that no other person than those designated can be cited; but the Surrogate's Court has no jurisdiction, either of subject-matter or person “ except such as is expressly or by necessary implication conferred by statute.” (Matter of Thompson, 184 N. Y. 36, 44.) Hence, unless jurisdiction of the person of the bank is conferred by statute it does not exist.

Although the bank is described in the petition as a depository of funds alleged to belong to the decedent, the statement in the account makes it clear that at the death of the decedent the bank was only a debtor either of the decedent or of the person named as a possible beneficiary of the deposit. The accountant insists

that he, as the representative of the decedent, is entitled to the amount of the deposit. He, therefore, limits himself to the claim that the bank owed a sum of money to the decedent at the time of death, either in the absence of a trust or on the theory that any trust which was created by the deposit for the benefit of the possible beneficiary was void as to the estate, or its creditors, upon some equitable ground.

Nowhere in the statutes to which alone appeal must be made in support of the jurisdiction asserted is it either provided or implied that in an accounting by an executor such a debtor of the estate or the trustee of a voidable trust attempted by the decedent is a necessary or proper party. Except for the Code section to be quoted presently, the statute as it is does not differ from the statute as it was before the revision of 1914.

Formerly it was implied, as it is now provided, that persons of prescribed classes should be cited. Then, as now, the statute contained no affirmation or suggestion that the court could take corporate jurisdiction of any persons other than those to whom citation was to be addressed, and there was a statutory silence as to whether any persons not among the classes indicated were either necessary or proper parties.

It results that the cases which arose under the former conditions must control the interpretation of the present statute. These cases held that persons not interested in the estate or fund, either as persons entitled to a benefit in the estate under the will or as creditors of the decedent, were not to be impleaded in an accounting. (Matter of Thompson, *supra*; Matter of Redfield, 71 Hun, 344; Duncan v. Guest, 5 Redf. 440; Matter of Witte, FOWLER, S., N. Y. L. J. Jan. 16, 1913; Matter of Collmar, 79 Misc. Rep. 592.) They apply to a person against whom the accountant alleges a debt or other affirmative cause of action. But the executor resorts to section 2510 of the Code as a new source of jurisdiction under which this present procedure is justified. That section is in part as follows:

“ Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

“ To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.”

The jurisdiction for which the executor contends would involve a departure from the traditions of this court so distinct and aggressive that nothing but clear words of grant would justify it.

In *Matter of Thompson* (*supra*), which was an accounting by the wife and executrix of the decedent, a creditor claimed that a part of the proceeds of a policy of insurance upon the life of the decedent, which the wife had collected, formed a part of the estate. The surrogate took cognizance of the question, whether the proceeds belonged to the decedent's wife or to his estate, and surcharged the executrix with the sum involved, for the benefit of creditors. This was disapproved by the Court of Appeals, and of the question thus determined, Judge VANN said: “ The allegation that the insurance moneys were property of the estate did not give the surrogate jurisdiction to try the question of title or to enforce the lien any more than if a similar allegation had been made with reference to real estate, or to personal property fraudulently transferred, or to the income from a trust fund in excess of the amount necessary to support the beneficiary, and the like. Such questions are still withheld from the Surrogate's Court and when the Legislature intends to extend its jurisdiction to those subjects it is safe to assume that

it will do so in express terms and not leave it to be inferred from vague and indefinite expressions."

It is under the caution contained at the end of the quotation that we must proceed in considering section 2510 of the present Code.

The powers conferred by this section are guarded by provisions which indicate that the questions which the court may determine must be questions "between parties to the proceeding" or "between any party and any other person having any claim or interest who voluntarily appears or who is brought in by supplemental citation," as well as by the further provision that such questions must pertain to matters "necessarily to be determined" in order to make a disposition of "the matter."

The "parties to the proceeding" can only be those who are properly such. It cannot be suggested that the jurisdiction conferred was intended to embrace anybody whom the petitioner in a proceeding unlawfully impleads. It is well understood that a party to a judicial proceeding is one whose interest in the subject-matter, whether favorable or adverse, is such that his presence upon the record is either necessary or proper. This test throws the mind away from the mere fact that a person has been named as a party. It makes the nature of the case the only standard.

This is the inevitable result of general principles set forth in the cases cited *supra*, without which every person who might be loaded into a proceeding at the whim or design of a litigant would forever remain a party, however strange to the subject-matter, but these rules are now carried into the new statute by which the persons of whom the Surrogate's Court has bodily jurisdiction as parties are designated, necessarily to the exclusion of all others. (Code, § 2511.) Among these are persons "duly cited," and unless the words quoted are so restricted as to refer only to the method of service, which would be idle and in-

tolerable, they must mean "properly included in a citation which was properly served."

If this interpretation be just, the rule once announced when the Code did not contain any express provision as to the persons over whom the surrogate had jurisdiction is now clearly confirmed. It would follow from the earlier cases, and with precise force from this section last cited, that the bank in the case at bar was not "duly cited" and, therefore, is not a party subject to the jurisdiction which the section confers.

The section, 2510, shows no intention to enlarge the class of persons who may be parties. Its provisions are amply fulfilled if it be held only to bestow greater powers for the disposition of questions which already normally inhere to a proceeding in which the parties lawfully impleaded therein are only such as are made lawful parties by provisions found elsewhere in the Code. The section is satisfied if it be held merely that new facilities are afforded for the disposition of old controversies necessarily cognate to the old subject-matter but which were once unavoidably and unfortunately left to a court of larger jurisdiction.

This appears in the words which define and limit all the powers contemplated under the enactment. These are the words with which the provision closes, viz., that the questions of which the court is granted cognizance are those "arising * * * as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires."

"The matter" is manifestly the proceeding together with all that needs to be disposed of within the recognized confines of the cause in order to adjust all the interests of all the parties therein.

In *Matter of Holzworth* (166 App. Div. 150; *affd.* without opinion, 215 N. Y. 700) which was an accounting by an executor, it was claimed that "by section 2510 of the present Code of Civil Procedure the Surrogate's Court had been given full

equity jurisdiction in every proceeding that comes before it," and that the surrogate in that case "had the power to exercise this full equity jurisdiction on the facts that came before him" and, therefore, to direct the disposition *in specie* of certain assets of the estate.

In the Appellate Division, Mr. Justice CARR found that the proposal so to distribute the assets was specifically governed by section 2736 of the Code, which, among other conditions particularly imposed as a prerequisite to a distribution in kind, required that a consent of all the parties interested be filed.

Says the court: "The surrogate had no jurisdiction whatever to act as he did unless there is some other provision of the statute (than section 2736) which confers the power upon him."

The remainder of the opinion is devoted to the inquiry whether section 2510 contains any power sufficient to override the precise regulations found in section 2736. The obvious question was whether the grant of equity faculties with which the section 2510 opens could be said to prevail as the sole and plenary source of the surrogate's power against the limitations which in section 2736 were laid at the root of any power whatever.

In this respect the court concludes: "As I understand the law of statutory construction, all general phrases in a statute must yield to a particular specification contained in the same statute. As to the subdivisions of section 2510, just quoted, the cases and the manner in which the surrogate may exercise his equitable jurisdiction are specified particularly. Where there is such a specification, it must exercise its jurisdiction in accordance with the specification. Its general equitable power must yield to the statutory restrictions upon it or directions as to it, and where the statute prescribes when and how it shall act, it cannot act otherwise than is prescribed. I think this is so well settled, even as to courts of general equitable jurisdiction, as to require no discussion."

The clear teaching of the case is that, however broad the grant of power under section 2510, it is curbed by the express command of section 2736.

The parallel is complete. However ample the grant of powers might be for application to the case at bar, if it were not qualified elsewhere in the statute, it must yield to clear enactments in the same statute which prescribe the court's jurisdiction of the person and limit the class of necessary and proper parties.

It is useless to argue that in the opinion quoted there was any thought that the particular provision of the statute which restricted the general power was to be found in section 2510. There was no restriction or specification in that section as to distribution in kind. The only suggestion in any of its subdivisions 1 to 8 as to qualifications of any of the powers therein contemplated was that such qualifications were to be looked for in statutes other than the section itself.

Subdivisions 1 to 8 contain no words of narrowing tendency. They are themselves as general and expansive as is the grant of power which precedes them. There is a free and joyous amplitude in their description of subjects of which the court may take cognizance, but, as to restraints upon the treatment of these subjects, the only reference is contained in the words "in the cases and in the manner prescribed by statute," language plainly postponing the mind to instances and methods to be sought outside of the section itself.

In section 2736, one of these other statutes, there is the definite restriction with respect to distribution *in specie* which nobody can discover in these subdivisions 1 to 8.

That was the restriction which the court found. It was that upon which the court had commented as the only specific regulation of the surrogate's power, unless some other provision was found in section 2510. While the opinion quotes subdivisions 3 and 4 of section 2510 they are quoted only to introduce and give meaning to section 2736.

Motion granted.

Matter of the Judicial Settlement of the Account of Proceedings of EUGENE V. BREWSTER, as General Guardian of STANLEY V. GIBSON, Infant; Matter of the Judicial Settlement of the Account of Proceedings of EUGENE V. BREWSTER, as General Guardian of J. LEROY GIBSON, Infant; Matter of the Judicial Settlement of the Account of Proceedings of EUGENE V. BREWSTER, as Administrator of the Goods, Chattels and Credits Which Were of CARRIE L. GIBSON, Deceased; Matter of the Judicial Settlement of the Account of Proceedings of EUGENE V. BREWSTER, as Substituted Trustee Under the Last Will and Testament of CARRIE L. GIBSON, Deceased.

(Surrogate's Court, Kings County, November, 1915.)

JURISDICTION—OF SURROGATE—CONSTITUTIONAL LAW—CODE CIV. PRO., § 2510; EXECUTORS AND ADMINISTRATORS—ACCOUNTING—JUDICIAL SETTLEMENT OF ACCOUNT OF GENERAL GUARDIAN—ADMINISTRATOR WITH WILL ANNEXED—TRUSTS—WILLS.

The jurisdiction conferred upon a surrogate by section 2510 of the Code of Civil Procedure, to determine all questions legal or equitable "arising between any and all of the parties * * * as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires," must be loyally assumed, and this court will not question the constitutionality of said section.

In a proceeding for the judicial settlement of the account of a general guardian and also of the account of an administrator the assets with which both accounts were concerned came from the mother of the two respondents, who died leaving a will under which an executor was appointed. Said executor delivered the fund of his trust to the accounting party herein before he had received any appointment as guardian, trustee or administrator with the will annexed. Thereafter and at a time when both respondents were minors said accountant was appointed their general guardian and later received letters of administration with the will annexed upon the estate of the respondents' mother and still later was appointed substituted trustee of the trust created by said will. In each of these capacities the petitioner accounts, displaying in each account the same items of receipts and disbursements, the same aggregates and the same final statement. The will contained a trust implied but dis-

inct, under which respondents are the sole beneficiaries for a term and in remainder. The trust requires that the fund thereof be used for the support of respondents according to the discretion of said guardians, necessarily meaning the trustees of the trust. There has never been a time when either of the respondents had any estate derivable from his mother of which a guardian could take charge and there has never been a time when there was any property as to which the accountant as administrator had any possession or right of possession. At all times since the accountant has been concerned with the asset for which he accounts the only person entitled to the custody and administration of said assets has been the testamentary trustee whose account is the only account requiring adjustment.

PROCEEDING upon the judicial settlement of the account of a general guardian, etc.

Harry J. Sokolow, for accountant.

Bostwick & Thoms (Laurence A. Sullivan and Theodore du Moulin, of counsel), for objectants.

KETCHAM, S.—The petitioner presents releases by virtue of which he claims to be relieved from the duty of accounting to the beneficiaries of his several trusts.

The jurisdiction of this court to consider equitable defenses to these releases is within the text of the statute. It is provided by section 2510 of the Code of Civil Procedure that the surrogate may determine all questions, legal or equitable, "arising between any and all of the parties * * * as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires."

This court will not discuss the constitutionality of this enactment. While it is within the power, and sometimes within the duty, of a court sitting in the first instance to entertain a constitutional question, it is a rule of practical force, though resting only in judicial convenience and policy, that such questions

shall generally be left to the more deliberate consideration of an appellate court.

The views of Mr. Surrogate FOWLER upon this subject must be adopted. In *Matter of Thornburgh* (72 Misc. Rep. 619) he says: "But the transcendent power of declaring an act of the legislature unconstitutional should never, in my opinion, be assumed by a court of first instance, except possibly in rare cases involving life or liberty, and where the invalidity of the legislative act is apparent on its face. The exercise of a judicial power to declare acts of the legislature void should, I think, be reserved to the graver courts of the state, in solemn session *in banc*, or held for the final review of such great questions. Otherwise the processes of the government may be disorganized by the action of a single judicial officer possessed of a little brief authority. Such an individual exercise of power tends to bring into contempt with the people an historic jurisdiction, approved by the wisdom of the greatest of mankind — a jurisdiction of fundamental importance to constitutional government when well exercised, and of most evil import when lightly exercised by a single judge animated, perhaps, by some theory squaring with his own conceptions of government or polity. Doubtless the ultimate power to test the validity of legislative enactments by a solemn comparison with delegated constitutional powers is of supreme importance and the keystone of our political fabric. But the power and the exercise of the power are distinct.

"It is well known that the power of the American judiciary to guard the citizen against legislative violation of delegated authority to enact laws is not original or a novelty in government, as often asserted. Nor is it a mere phenomenon or experiment. On the contrary, it is the result of political experience of long duration. In England a similar assertion of judicial power just missed a triumph. Lord COKE, in *Dr. Bonham's case* (8 Rep. 118a) cited several ancient cases in support of the inherent judicial power to pass on the validity of an act of Parlia-

ment; and a great judge, HOBART, Lord Chief Justice of the Common Pleas, in the reign of James I (Day v. Savage, Hobart, 87), used these memorable words: 'Even an act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself for *jura naturæ sunt immutabilia*, and they are *leges legum*.' The embarrassment of exercising such a judicial power in a monarchy where judicial proceedings were theoretically before the King himself — *coram rege ipso* — caused it to miscarry in the end in England. But in the English colonies the power of the judiciary to determine an act of the Colonial legislature void as unconstitutional was very familiar to the framers of the Federal Constitution. The judiciary articles of that Constitution and of the state constitution were only an evolution and no artifice or innovation. The due exercise of so fundamental a principle of American government — one so vital to national existence — should not, I think, be invaded rashly, or degraded by an immoderate use in a court of first instance. For these reasons the surrogate would regard it as a breach of decorum for him to undertake to pass upon the validity of chapter 676, Laws of 1910. In this court the constitutionality of an act of the legislature must be presumed for the sake of propriety, if for no other reason."

The reasoning which forbids adjudication by this court must with greater force restrain it from mere declamation, for if considerations of modesty and deference would be offended by decision, they would be violated by a discussion which could have no decretal end.

Hence, the jurisdiction which the statute confers must be loyally assumed.

The releases and other instruments asserted by the accountant must be disregarded.

Probably upon merely legal grounds they are without present effect.

The petitioner first files accounts in each of the four relations

which he bears towards the respondents. In each of these his dealings with the fund are reported in detail, and the respondents are invited to attend the final settlement of accounts, in which many items of receipt and disbursement are tendered them for inspection and criticism.

After objections to these accounts are filed, without permission to amend, he files statements, drawn and verified in the form of accounts, which are made in his behalf as trustee and as administrator with the will annexed, alleging that no assets have come into his hands, and others as guardian, emphasizing his claim of release, and annexing copies of the instruments upon which he relies.

In *Matter of Lyth* (32 Misc. Rep. 608) Mr. Justice MARCUS, then surrogate, held that executors, who had petitioned for the final settlement of their accounts, and cited all parties interested to appear upon the return day, could not be heard to interpose the Statute of Limitations after the appearance of parties and the filing of objections.

There is nothing said in the case cited as to the right of the executors to interpose the bar of the statute which does not apply in this case to the plea of release.

But if the releases, and other instruments, be subjected to equitable scrutiny they must be avoided upon obvious grounds. Any claim that as to either of the respondents there was a ratification of any release must fail in the face of evidence, accepted by the court, that at the time when it is said that either of the beneficiaries acquiesced in a release previously made by him, the person concerned was without knowledge of the facts material to the act of ratification.

It becomes necessary to determine in which of the petitioner's capacities his accounts with the respondents are to be settled.

The assets with which these accounts are concerned came from the mother of the two respondents, who died, leaving a will under which an executor was appointed. This executor delivered the

fund of his trust to the present accountant before the latter had received any appointment as guardian, trustee or administrator with the will annexed. Thereafter, and at a time when both respondents were minors, the accountant was appointed their general guardian. Later he received letters of administration with the will annexed upon the estate of the respondents' mother, and still later he was appointed substituted trustee of the trust created in the said will.

In each of these capacities the petitioner accounts, displaying in each account the same items of receipt and disbursement, the same aggregates and the same final statement.

The will under which he was appointed trustee contains a trust, implied but distinct, under which the respondents are the sole beneficiaries for a term and in remainder. The trust requires that the fund thereof be used for the support of the respondents according to the discretion of said guardians, necessarily meaning the trustees of the trust. There has never been a time when either of the respondents had any estate derivable from his mother of which a guardian could take charge, and there has never been a time when there was any property of any kind as to which the accountant as administrator had any possession or right of possession. At all times since the accountant has been concerned with the assets for which he accounts, the only person entitled to the custody and administration of such assets has been the testamentary trustee.

It is in strict accordance with the legal truth that the accountant charges himself with the residue of the entire estate in his capacity as substituted trustee, and, while he says the same thing as to the same fund in his several accounts as guardian and administrator, it is easy to accept his avowal of a custody which is the only custody legally possible and to reject his contrary statement when the latter cannot be true.

His account as trustee is, therefore, the only account which requires adjustment.

The petitioner charges himself with the body of the estate, and credits himself with administrative disbursements, without assigning or dividing them as between the beneficiaries. In schedule B of his account there are items both of principal and income, and in schedule C there are stated, without distinction, payments to the beneficiaries both of principal and income. This infirmity is not objected to by the respondents, and the account will be settled without distinction as to their respective interests, upon the assumption that they elect to dispose of their conflicting interests, if any, by personal agreement.

The issues presented by the main objections, dated November 6, 1914, are disposed of as follows:

The items enumerated in the respondents' objections numbered 1, 3, 4 and 5 are disallowed.

It cannot be successfully argued that paragraph 28 of the stipulation submitted is a waiver of the necessity of voucher or proof in support of disbursements.

Objection number 2 is overruled. Objections 6 and 7 are in part withdrawn and may well be entirely overruled, unless respondents desire to have a precise consideration of the principal and income accounted for.

There is no need to dispose of objections 8 and 9, which were only to the form of the fund for which the accountant will be charged in the decree.

The supplemental objections, dated June 2, 1915, made in behalf of Stanley V. Gibson, are disposed of as follows:

The second objection is sustained. The third objection is sustained, and will result in a charge in favor of the single objectant of \$3,623 in excess of the sum in which the interests of the two beneficiaries are combined. This sum should bear interest at the rate of 6 per cent. from July 19, 1910.

No investment was made for the benefit of any of the accountant's trust of \$4,200 with which he charges himself. The only finding which the evidence and presumptions yield is that

it was part of the estate which he received from his predecessor in the trust and which was managed by him from a time at least as early as April 19, 1904. He is chargeable with interest on this sum from the date last named, at the rate of 5 per cent. less, however, all sums with which he charges himself as for interest on the Meachan-Hyams mortgage.

The objectants are entitled to interest upon the balance found against the accountant from the date of the accounting to the date of the decree.

Proper decrees may be entered in all of the accountings.

Decreed accordingly.

Matter of the Appraisal Under the Transfer Tax Acts of the
Property of MARIA SOPHIA RUDOLPH, Deceased.

(Surrogate's Court, Kings County, November, 1915.)

**TRUSTS—IRREVOCABLE—DEPOSIT OF MONEY IN SAVINGS BANK IN TRUST—
WHEN NOT SUBJECT TO TRANSFER TAX.**

Where a decedent deposited certain of her own money in a savings bank in her own name in trust for a named niece, and at a time not shown delivered to her the bank book which remained in her possession continuously until decedent's death, and it appears that there were neither withdrawals nor additions to the deposit, the finding must be that the deposit was of the character of an irrevocable trust and therefore not subject to a transfer tax.

APPEAL by an executrix from the imposition of a transfer tax.

Furst & Furst (Arnold S. Furst, of counsel), for appellant.

Marcus B. Campbell, for state comptroller, respondent.

KETCHAM, S.—The executrix appeals from the imposition of a transfer tax upon a transfer to her personally of a savings bank deposit.

The sole question is, whether in the lifetime of the decedent she created an irrevocable trust in the deposit for the benefit of the appellant.

The fund in question was deposited in a bank account in the name of the decedent in trust for the appellant, at a time not stated. The money deposited must be assumed to have belonged to the decedent at the time of the deposit. The book representing the account, and containing the statement that the same was in the name of the decedent in trust for the appellant, was delivered by the decedent to the appellant at a time not stated. The book then remained in the appellant's possession continuously until the decedent's death. Since the delivery no sums were withdrawn from the account and none were deposited to its credit.

The decedent was the aunt of the appellant. While it was stated at the argument, without dissent, that at the time of the delivery of the bank-book the decedent and the appellant were living in separate places in the same city, no proof as to their residence appears.

Under these circumstances, the finding must be that the delivery of the bank-book imposed upon the deposit the character of an irrevocable trust.

Such was the conclusion of the Appellate Division of this department, in *Matter of Davis* (119 App. Div. 35) upon facts which were at least no more expressive of an intention by the depositor to create an absolute trust than are the facts at bar. There the wife made deposits in her name in trust for her husband named. The husband died before the wife and before the revocation of the trust, and the books representing the deposits were then found in the beneficiary's safe deposit vault. There was no evidence tending to show the intention of the depositor other than the circumstances stated *supra*.

Quoting the opinion in the *Totten* case, to the effect that the trust remains revocable "until the depositor dies or completes

the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass-book or notice to the beneficiary," Mr. Justice HOOKER, for the court, says: "Standing alone, the mere deposit of her money in her name, as trustee for him, did not establish, under the rule in the Totten case, an irrevocable trust; but the finding of the pass-book in the safe deposit vault of the beneficiary necessarily implies that there was notice by the depositor of the trust to the beneficiary. Inasmuch as notice to the beneficiary is one of the examples of an unequivocal act or declaration by which the depositor completes the gift, used by the Court of Appeals to illustrate the rule, we must hold that the notice to William H. Davis (the beneficiary), completed his wife's gift to him and rendered the trust irrevocable."

Obviously, it was considered by Mr. Justice HOOKER that the delivery of the pass-book was not only the "delivery" which the Court of Appeals, in the Totten case, instanced as one of the "unequivocal acts" by which the gift could be completed, but that delivery, if it were made to the beneficiary personally, would also embrace and constitute the "notice" which the Court of Appeals contemplated as the "declaration" by which the completion of the gift might be made to appear.

In *Stockert v. Dry Dock Savings Institution* (155 App. Div. 123) the depositor took a pass-book from a savings bank in her name in trust for her niece named, and delivered the same to the beneficiary at the time of the deposit.

Mr. Justice SCOTT, writing for the Appellate Division of the first department, says: "The only evidence as to the intention of the depositor at the time the deposit was made is that she at once gave the bank-book to plaintiff. That evidence, standing alone and unqualified, fixed the character of the trust as an irrevocable one under the rule in the Totten case."

The case last cited is controlling, unless the conclusion which follows from a delivery by the depositor at the time of deposit is to be held to be different from the conclusion to be derived from

a delivery made at some time not known or at a time after the deposit. Whether delivery be made at the time of the deposit, or later, the trust in each case is capable equally of revocation or execution at the moment of delivery, and the act which in one instance would change a tentative purpose to a fixed purpose would apparently have the same effect in the other instance.

If the case at bar be regarded as one where the time of delivery is unknown, it is in precise parallel with the facts of the Davis case (*supra*) where all that was known of the delivery was that the subject thereof was found in the possession of the beneficiary at the time of his death.

In Matter of Farrell (N. Y. L. J., Jan. 13, 1912) also reported in Christie on Inheritance Taxation (p. 797) the delivery of the bank-books was made some years after the deposits, and the report of the case does not disclose any evidence other than the fact of delivery tending to show the intention of the act. Mr. Surrogate FOWLER says: "The deposit by the decedent of his own money in trust for his children constituted a revocable trust until some unequivocal act on his part showed that he desired the gift to become absolute. The unequivocal act was the delivery of the bank-books to the *cestuis que trustent*," citing Matter of Totten (179 N. Y. 112).

In Matter of Reed (89 Misc. Rep. 632) Mr. Surrogate OSTRANDER, in determining whether transfer tax was to be imposed, says: "The deposit made in trust for Fred S. Clute by the deceased seems to fall within the rule of Matter of Totten (179 N. Y. 112); Matter of Pierce (132 App. Div. 469); Stockert v. Dry Dock Saving Institution (155 id. 123); Hessen v. McKinley (Id. 496), where it was held that when notice of the trust form of the deposit was given to the beneficiary the trust became irrevocable. The transaction amounted to a gift *inter vivos*, the title passed at the time and the deposit was not taxable."

While the record of the case last cited does not disclose the

nature of the notice which was given of the form of the deposit, there can be no conceivable notice of the trust form of a deposit stronger than that which is contained in the delivery to the beneficiary of the book which is itself the express form of the deposit.

These cases have been treated in detail, for they seem to be out of line with *Matter of Halligan* (82 Misc. Rep. 30) with which authority the court would be loath to disagree, except upon studious consideration of appellate decisions to the contrary.

The appeal is sustained, and the order must be modified accordingly.

Order modified.

Matter of the Estate of RAFFAELE BALDASARRO, Deceased.

(*Surrogate's Court, Jefferson County, December, 1915.*)

EXECUTORS AND ADMINISTRATORS—APPLICATION BY COUNTY TREASURER FOR REVOCATION OF LETTERS OF ADMINISTRATION—CODE CIV. PRO., § 2570.

Where letters of administration upon the estate of a resident alien and subject of the kingdom of Italy were issued to the proper consular agent, and the estate, which is small, is ready for final distribution, the surrogate under section 2570 of the Code of Civil Procedure may in his discretion refuse to entertain an application made by the county treasurer for the revocation of the letters of administration, and by reason of the treaty between this country and Italy it will be decreed that the fund be paid to the consul general of Italy residing at the city of New York who appeared in behalf of the next of kin of decedent.

PROCEEDINGS upon application for the revocation of letters of administration.

Gilbert S. Woolworth, for petitioners.

Du Bois & McDermott, for administrator.

ATWELL, S.— The deceased above named, who met with accidental death on the 3d day of May, 1914, was a resident alien, a subject of the kingdom of Italy.

On the 19th of May, 1914, letters of administration upon his estate were issued by this court to Germano P. Baccelli, consular agent for the kingdom of Italy, residing at Albany, N. Y.

Since such letters were issued, the administrator has collected \$810.08, of which \$750 was recovered in settlement of a cause of action for negligently causing the death of the deceased against one Millard. The administrator also recovered judgment for \$750 against one Weeks for the same cause; that said Weeks has since died and has left no estate and the said judgment remains uncollected and uncollectible. In August, 1915, the administrator filed his final account showing the above facts, and that he has paid the funeral expenses of deceased and counsel fees and other expenses and has on hand for distribution the sum of \$457.56, subject to commissions and expenses of accounting.

This fund should be distributed among the next of kin of the deceased, who are his mother and four sisters residing at Apise, province of Benevento, Italy. G. Fara Forni, consul general of the kingdom of Italy, residing in New York city, has appeared in behalf of the next of kin and claims that the fund should be paid to him by reason of the provisions of the treaty between this country and Italy. This right has been recognized in the Surrogates' Courts of this state. (Matter of Tartaglio, 12 Misc. Rep. 245; Matter of Davenport, 43 id. 573.)

I am inclined to follow these decisions and grant the decree asked for unless the letters issued must be revoked by reason of a recent application therefor.

On the 30th day of November, 1915, the county treasurer of Jefferson county presented his petition claiming that he has a prior right to letters of administration upon this estate and demanding that the letters issued herein May 19, 1914, to Ger-

mano P. Baccelli be revoked and that new letters be issued to himself.

This application is made under the provisions of section 2569 as I understand it, and, by the provisions of section 2570, the surrogate may, in his discretion, refuse to entertain the proceeding and refuse to issue a citation.

I cannot see how any good can be accomplished by revoking these letters and issuing new letters; the estate is ready for decree of final distribution. The petition presented does not state any new facts or show that any other assets have been or are likely to be discovered, or allege any good reason why, at this late stage, a change in administrators should be made. Such change would involve more and unnecessary expense. The amount left for distribution is small and should not be subjected to any further expense. I, therefore, think it would be a proper exercise of discretion to decline to entertain the proceeding, and to do otherwise would work an injustice upon the next of kin. The application for a citation is, therefore, refused.

Since preparing this memorandum one Marco Paragent, claiming to be a cousin of the deceased, has presented a similar petition through the same attorney who presented the county treasurer's petition asking for the revocation of the letters issued to the Italian consular agent and the issuance of letters to the county treasurer. This petition the surrogate also declines to entertain for the reasons above stated.

Decreed accordingly.

Matter of the Estate of CHARLES H. MORRIS, Deceased.

(Surrogate's Court, Saratoga County, December, 1915.)

EXECUTORS AND ADMINISTRATORS—TO WHOM LETTERS GRANTED—WHEN LETTERS REVOKED.

Where on petition of a sister of a decedent for the revocation of letters of administration granted to one claiming to be his widow she admits that she was never married to decedent, such admission being against her interest, it must be taken as a fact that they were never married, and the letters will therefore be revoked and administration granted to petitioner.

APPLICATION for revocation of letters of administration.

Oscar Warner, for petitioner, Mary Ross.

Leary & Fullerton, for administratrix.

OSTRANDER, S.—Deceased died a resident of Mechanicville in the fall of 1912. Adelia Morris or Adelia Rose claiming to be the widow of deceased applied for, and was granted, letters of administration upon his estate. Mary Ross, the petitioner, a sister of deceased, applies for a revocation of these letters and a grant of administration to her upon the ground that Adelia was never the wife of deceased.

Morris married one Etta Demick, who divorced him at Syracuse, N. Y., about 1893, and is still living. There is no proof of any ceremonial marriage between Morris and Adelia. There is no evidence of any permission by the court for his remarriage.

In the years 1905 and 1906, Morris and Adelia went from Albany, where they were living, into Vermont on a visit to some of Adelia's acquaintances. Immediately upon their arrival in Vermont, they introduced each other as husband and wife.

They lived together for two years or more in Albany, and afterwards at Mechanicville for a matter of five years, introducing each other to various persons as husband and wife.

One Welsh, an officer, living at Mechanicville, testified that he had known the parties for a considerable time, and that Adelia was called "Rose;" that nobody ever called her "Morris" and that in the summer before Morris died he was in Morris's saloon when Adelia came into the bar-room and told Morris that she was working for him like a slave, and getting nothing for it, and Morris replied she was getting pay for what she did for him. She also said on that occasion that she was running a regular disreputable house for him and called him many vile names.

When Morris died, he was taken to an undertaker's rooms and Mary Ross, the petitioner, met Adelia at the rooms. Adelia then claimed to Mrs. Ross that she was Morris's widow. Mrs. Ross asked her how that could be as Morris had been married before and had been divorced and his wife was still living. Adelia said that Morris had told her about his former marriage and divorce but she said she loved him and that she wanted to cover up the way they were living and admitted that she was never married to him. There is no denial of this by Adelia.

It is well settled that cohabitation together as man and wife and declarations by the parties concerning their relations as husband and wife, etc., do not constitute a marriage, but they are evidential facts from which, in the absence of proof to the contrary, a strong presumption of marriage arises because they are circumstances which usually attend that relation.

Mere living together and repute do not alone constitute a valid marriage. (Matter of Hamilton, 76 Hun, 200.)

The proofs in this case establish such cohabitation, repute and declarations of matrimonial living together as would, in the absence of proof to the contrary, be sufficient circumstantial evidence of a marriage to raise a presumption of marriage, provided Morris was not under disability. But it is a well-settled

rule that all presumptions of fact vanish at once in the light of proof to the contrary.

In the present case the presumption of marriage which would ordinarily flow from the relations and declarations of Morris and Adelia is rebutted by the admission of Adelia that she was not married to Morris, which was somewhat strengthened by her statements in the presence of Officer Welch.

Her positive statement that she was not married to him was an admission against her interest and in the absence of any denial of this admission by her it must be taken as an established fact that they never married.

In this view of the case it becomes unnecessary to consider the question of Morris's disability by reason of the divorce against him.

It follows that the prayer of the petition should be granted and the letters issued to Adelia revoked.

Decreed accordingly.

Matter of the Estate of SARAH YOUNG.

(*Surrogate's Court, Bronx County, December, 1915.*)

EXECUTORS AND ADMINISTRATORS—PROVISIONS OF WILL—APPLICATION FOR CONSTRUCTION OF WILL—RIGHT OF EXECUTOR TO PAY FUNERAL EXPENSES.

A will contained the provision: "I direct my executor after paying the above bequests out of the balance of my money on deposit in the Bowery Savings Bank and Seamans Savings Bank, that said balance shall be used to defray Funeral Expenses and the erection of a monument over my grave."

Decedent's estate amounted to \$1,471.95 and the net amount to become available for the erection of a monument would probably amount to \$253.18. The executor, being in doubt as to whether he was required to expend the whole amount of the balance referred to for the erection of a monument, applied for a construction of the will.

Held, that without any testamentary direction to that effect an executor has the right to pay the funeral expenses of the decedent, and a reasonable sum for a tombstone is regarded as a legitimate item of such expenses; that no arbitrary rule can be laid down establishing what is such reasonable sum, and each case depends for its determination upon its own peculiar conditions; that the provision under consideration did not in terms require that all of the balance should be expended for funeral expenses and the erection of a monument, and that the intent of the testatrix was that so much of the balance as would be reasonable, having in mind her station in life and the amount of her estate, should be used for such purposes.

PROCEEDING to obtain a construction of a will.

Arthur C. Kahn, for petitioner.

SCHULZ, S.—The decedent left a document which has been admitted to probate as her last will and testament, by which she bequeathed to one of her daughters the sum of \$500, to another daughter \$200, and to a niece the sum of \$100. She then provided as follows: "I direct my executor after paying the above bequests, out of the balance of my money on deposit in the Bowery Savings Bank and Seamans Savings Bank, that said balance shall be used to defray Funeral Expenses and the erection of a monument over my grave."

The executor has brought this proceeding to obtain a construction of this clause of the decedent's will, being in doubt as to whether, under its terms, he is required to expend the whole amount of the balance referred to, or is authorized to expend enough thereof to erect a monument similar to the one which the decedent purchased upon the death of her husband some years ago. The expenditure for the latter amounted to about \$75.

Up to the present time he has deposited on account of a headstone the sum of \$25, and he asks that he be authorized and directed to spend an additional sum of \$50 for the erection of a monument.

The daughters of decedent are her only heirs at law and next of kin and they join in asking that the will be construed as prayed for by the petitioner. The construction to be placed upon the clause in question, of course, should not be influenced by the fact that the persons interested consent to any particular form of construction. It depends solely upon the intent of the testatrix. As there is no latent ambiguity arising *dehors* the will, her intent must be ascertained from the will itself and the alleged declarations of the decedent detailed in the affidavits cannot be considered by me. (Mann v. Mann, 1 Johns. Ch. 231; Reynolds v. Robinson, 82 N. Y. 103; William v. Freeman, 83 N. Y. 561. When thus established the intent of the testatrix must be given effect. (Phillips v. Davies, 92 N. Y. 199; Robinson v. Martin, 200 id. 159.)

The total estate of the decedent amounted to \$1,471.95. The petitioner states that the net balance after the payment of legacies, funeral expenses and expenses of administration incurred and to be incurred, including the item of \$25 aforesaid, will probably amount to \$228.18. The funeral expenses amounted to \$155.30. The question, therefore, is whether the decedent intended that there should be expended for her funeral the sum of \$155.30 and in addition thereto for a monument the sum of \$253.18.

Even without any testamentary direction to that effect, an executor has a right to pay the reasonable funeral expenses of the decedent (Code Civ. Pro., § 2686), and a reasonable expenditure for a tombstone is regarded as a legitimate item of funeral expenses. (Ferrin v. Myrick, 41 N. Y. 315; Tickel v. Quinn, 1 Dem. 435.)

In Matter of Boardman (20 N. Y. Supp. 60) it was held that a provision in a will that all of testator's property remaining after paying his debts should be expended for a monument, fence, etc., is to be construed with reference to the circumstances and situation in life of the testator, and only a reasonable por-

tion of his estate should be expended thereunder. In *Emans v. Bickman* (12 Hun, 425) the testator left his entire estate to his executors for his funeral expenses and the erection of a monument. The estate amounted to \$1,200, and the court held that it was the intention of the deceased to devote an amount which was reasonable in view of his position in life and the extent of his property, and affirmed the decree fixing the sum of \$150 as the limit to be expended for the monument.

No arbitrary rule can be laid down establishing what is a reasonable expenditure for a monument. Each case depends for its determination upon its own peculiar conditions. (*Matter of Erlacher*, 3 Redf. 8; *Matter of Howard*, 3 Misc. Rep. 170.)

A few of the large number of cases on this subject showing the attitude of the courts may be referred to with profit. In *Matter of Mount* (3 Redf. 9, note) the amount of the estate was \$983.30, and a charge of \$78 for a gravestone was cut down to \$50. In *Miller v. Morton* (89 Hun, 574) it was held that \$1,400 for a monument was too expensive for an estate of \$3,540. In *Matter of Beach* (1 Misc. Rep. 27) the court said that an estate of \$8,000 justified an expenditure of \$400 for a monument. In *Matter of Mount* (3 Redf. 9, note) it was held that a charge of \$700 for a burial lot and monument is excessive where the estate amounted to less than \$2,800. In *Owens v. Bloomer* (14 Hun, 296) the court considered an expenditure of \$500 for a monument extravagant, the estate not exceeding \$8,000. In *Burnett v. Noble* (5 Redf. 69) the personal estate being less than \$2,000 an allowance of \$700 was refused and reduced to \$250.

The provision now under consideration does not, in my opinion, in terms require that all of the balance shall be expended for funeral expenses and the erection of a monument, and I believe that the intent of the testatrix was that so much of the balance as would be reasonable, having in mind her

station in life and the amount of her estate, should be used to defray the funeral expenses and to pay for a monument.

The executor states that he knew the decedent for a number of years before her death, being related to her husband; that she lived with one of her daughters in a very frugal way and that her habits of life were modest and simple. These are facts which he should take into consideration in deciding how much to spend for a monument. As a guide to him I will say that a monument such as she purchased for her deceased husband would not be unreasonable in my opinion. I do not think that it is necessary for me to fix the cost of such monument arbitrarily, particularly when the executor himself has an intimate knowledge of the circumstances of the decedent.

I therefore find that the intent of the testatrix was as above stated and that as to any balance remaining in the hands of the executor after the payment of debts, legacies, expenses of administration and funeral expenses and after paying for a monument, the decedent died intestate, and such balance is distributable in accordance with the statute governing distribution of personal property.

Decreed accordingly.

Matter of the Transfer Tax Upon the Estate of MARY
McMULLEN, Deceased.

(*Surrogate's Court, Bronx County, December, 1915.*)

APPEAL FROM ORDER OF TRANSFER TAX APPRAISER—EVIDENCE—TRANSFER
TAX—CORPORATIONS.

On an appeal by decedent's next of kin from an order entered upon the report of the transfer tax appraiser it appeared that the decedent was the owner of 232 shares of capital stock in a corporation, the par value of which was fifty dollars per share. He died on January 18, 1914, and on April 20, 1915, the public administrator as administrator

sold at public auction 140 of said shares at thirty-seven dollars per share and 92 shares at thirty-six dollars per share. The appraiser fixed the value of these shares at seventy-eight dollars each, based upon a valuation of the physical assets and an estimate of the good-will of the corporation. He took a six years' purchase on the annual net profits, although the corporation had been in existence for only twenty months and justified this by the contention that it was continuing the business of another corporation. From the date of its incorporation in May, 1912, to February, 1915, there had been twenty-eight transfers of the stock of the corporation; fifty-three shares were sold in July, 1913, at twenty-five dollars, and eighty-four shares sold in December, 1913, at thirty dollars per share. The uncontradicted testimony of the treasurer of the corporation was that the shares were at that time worth forty-three or forty-four dollars per share and forty to forty-one dollars in January, 1913, and a few dollars more in January, 1914. The sale of the said 232 shares took place fifteen months after decedent's death. All the stockholders were notified of the sale.

The returns to shareholders from the profits of the corporation during its existence of about twenty months would be large. The appraiser did not give any weight to the evidence of the actual sales prices of the shares under consideration, nor to other sales of the same stock in arriving at a valuation of shares of the stock in question.

The appellant contended that the appraiser's valuation was unjustified and the questions presented were whether the appraiser was warranted in giving no weight at all to the evidence of actual sales prices of the shares under consideration, and, if so, whether he erred in his method of arriving at the valuation of good-will. Upon the facts

Held, (1) that the transfer which is taxed is that which takes place at the date of death and it is the fair market value of the property transferred at that time which forms the basis of the tax;

(2) That the amount realized by the sale at public auction after due and proper advertising and conducted in a proper and legal way represented the value of the shares of stock at the time;

(3) That the sale mentioned should have been considered by the appraiser, not as necessarily conclusive, but as one of the sales which together with the others made during the life of the corporation might have aided him in fixing the market value which is the subject of the tax;

(4) That other sales of stock and the uncontradicted testimony of one of its officers should have been considered in arriving at the valuation of the said 232 shares;

(5) That while the taking of a number of years purchase on annual net profits has received the sanction of courts, and while there are decisions to the effect that remote sales are not binding on the appraiser as to the value of the security at the date of death, such decisions do

not go so far as to hold that the appraiser, where the shares under consideration were sold in the manner and under conditions which fix the market value fifteen months after decedent's death and which may throw light on their value at the time of such death, must disregard them entirely in appraising property whose market value must of necessity be at best only an approximation;

(6) That the fact that the returns to shareholders from profits would be large does not of itself give the appraiser the authority to ignore actual sales of stock;

(7) That the method of fixing the value of the stock adopted by the appraiser should be resorted to only when there are no sales from which such valuation can be ascertained;

(8) That the corporation in question was not doing business under the name of a former corporation, and that there was no force in the contention that it was practically the former corporation and enjoyed its good-will should be based upon a calculation of profits before decedent's death, and the life of the corporation should be one of the elements considered;

(9) That the taking of a six years' purchase was not proper and that, under all the circumstances, a more just result would be obtained by taking the actual net profits made during the life of the corporation, about twenty months, as being the value of the good-will instead of a six years' purchase on the average annual profits.

(10) Accordingly held that the said shares should have been appraised at forty-four dollars per share.

APPEAL from an order assessing a transfer tax.

Gordon & Rogers, for appellants.

John Boyle, Jr., for respondent.

Ernest E. L. Hammer, public administrator in person.

SCHULZ, S.—The next of kin of the decedent appeal from an order entered upon the report of the transfer tax appraiser.

The decedent at the time of her death was the owner of two hundred and thirty-two shares of the capital stock of the Central Dairy Company, a corporation engaged in dealing in milk and dairy products. She died on January 18, 1914. Letters of

administration were issued to the public administrator on September 8, 1914, and the shares of stock were sold on April 20, 1915. The par value of the stock was fifty dollars per share, and at the sale one hundred and forty shares were sold at thirty-seven dollars per share and ninety-two shares were sold at thirty-six dollars per share.

The appraiser valued the shares of stock at the sum of seventy-eight dollars per share. He arrived at the said amount by giving each of the shares a value of thirty-six dollars and ninety-two cents, based upon the physical assets of the company. To this he added the sum of forty-nine dollars and seventy-six cents per share for good-will, thus fixing the gross value of each share at eighty-six dollars and sixty-eight cents. From this amount he allowed ten per cent. deduction for depreciation.

The appellant contends that this valuation is unjustified and, as there is no dispute about the value of the physical assets, the questions which remain are whether the appraiser was warranted in giving no weight at all to the testimony offered to show the value at the time of the transfer, and to the evidence of the actual sales' prices of the shares under consideration, and others sold during the life of the corporation, and, if so, whether he erred in his method of arriving at his valuation of good-will.

The corporation in question was organized in May, 1912, with a capital stock of \$600,000. The outstanding capital stock amounted to \$533,450, evidenced by 10,669 shares. From the date of its incorporation to February, 1915, there were some twenty-eight transfers of stock. The sales made nearest to the date of the death of the decedent were one of fifty-three shares purchased by the son and daughter of the treasurer in July, 1913, at twenty-five dollars, and one of eighty-four shares which were sold at thirty dollars per share in December, 1913. The treasurer of the company testifies that the shares of stock bought by his son and daughter were a bargain and below the market price and that in his opinion the same were worth forty-three

dollars or forty-four per share in July, 1913, and forty dollars to forty-one dollars per share in January, 1913, and a few dollars more in January, 1914.

The sale of the shares now in question was conducted by the public administrator and took place fifteen months after the date of the death of the decedent. He advertised in four newspapers, two of which are published and circulate in the county of Bronx, the third was the *New York Law Journal* and the other a paper devoted to and being the organ of the milk and creamery business, read by those in that line of business who would be most familiar with stock of this character and presumably interested in its purchase. In addition to this, the public administrator caused to be mailed a notice of the sale to each of the stockholders of the corporation and upon the record it has been stipulated that the notice thus given on April 15, 1915, was due and timely.

In my opinion the public administrator used diligence and good judgment in advertising the sale and in giving notice to people who would in the ordinary course of affairs be most familiar with the value of the stock and hence be most likely to be interested in its purchase. The results showed this for it appears that there were in attendance at the time of the sale between twenty-five and thirty-five persons.

The sale was conducted at public auction and, before the stock was sold, the report of an expert accountant who had examined the books of the company at the instance of the appraiser was read to the assembled prospective bidders. The shares were sold in blocks of ten with the exception of the last block offered which consisted of twelve shares. The bids upon the first lot offered began at twenty-five dollars per share and went up gradually to thirty-seven dollars per share. Thereafter, thirteen more blocks were sold at that figure. Then eight blocks were sold at thirty-six dollars per share each, the bids having begun at twenty-five dollars for each share and advancing to

that figure, and the final block of twelve shares was also sold at thirty-six dollars per share. The testimony is that there were seven or eight or possibly ten bids. Eight people bought stock. There is no evidence of any understanding or agreement among the bidders to limit the amounts of their bids, and no contention that there was such an agreement. I believe that the sale was properly conducted. I am satisfied that if, in the opinion of the stockholders present at this auction sale, the shares were worth more than they brought at that time, and it seems to me that the stockholders of all others should have known what they were really worth, the probabilities are very strong that they would not have stood by and seen them sold at a sacrifice.

If, therefore, the amount realized at a public auction after due and proper advertising and conducted in a proper and legal way is any criterion of market value, and in my opinion it is, then the prices which were realized at the time of the sale in question represented the value of the shares of stock at the time of the sale, and I so conclude. The value at the time of sale is not that upon which the tax is fixed, however. The transfer which is taxed is that which takes place at the time of death and it is the fair market value at that time which forms the basis of the tax. (Laws of 1909, chap. 61 [Consol. Laws, chap. 60], § 230.) See Matter of Penfold (216 N. Y. 171), recently decided by the Court of Appeals, in which many cases to that effect are cited.

Under my direction the appraiser received testimony as to the public sale, but he frankly states that he gave it no weight because it was so long after the death of the testatrix. From the uncontradicted testimony of the treasurer it appears that the condition of the company at the time of sale was better than it was at the time of the death of the decedent, and he intimates that the stock was worth more in his opinion at the time of the public sale than at the time of the death of the testatrix.

While there are decisions to the effect that remote sales are

not binding on the appraiser as to the value of the security at the date of death, I do not believe that they go so far as to hold that where the shares under consideration were sold in a manner and under conditions which fix the market value thereof fifteen months after the date of death, and which may throw light upon their value at the time of death, the appraiser must close his eyes entirely to them in appraising property whose market value must of necessity be at best only an approximation. (See *Marvin v. Medberry*, 13 Wkly. Dig. 544; *Matter of Roos*, 90 Misc. Rep. 521.)

Under those conditions I believe that the sale mentioned should have been considered by him not as necessarily conclusive but as one of the sales which together with the others made during the life of the corporation might have aided him in fixing the market value which is the subject of the tax. (*Matter of Smith*, 71 App. Div. 602.)

It is urged that when the shares were sold the European war was in progress and that this had some effect. The stock is not listed and not dealt in on any exchange, and the business was one which I do not believe was directly affected by the war. It may be, however, that the latter exercised a depressing effect on the value of these shares of stock and the appraiser, of course, had a right to consider this possibility.

Apparently the other sales made during the life of the corporation were not considered by the appraiser, nor was the testimony of the officer of the company, which in my opinion was entitled to some weight, because unimpeached and uncontradicted, and given by one who it appears from his testimony was fully conversant with the affairs of the corporation. (*Cable v. Cable*, 111 App. Div. 426.) The appraiser limited himself entirely to a calculation of the assets and an estimate of the good-will in fixing the value of the various shares. In this, I think, he erred; he should, in my opinion, have also considered the prices brought at the other sales, and the testimony of the

treasurer referred to. The fact that the returns to the shareholders from the profits of the corporation during its twenty months of existence would be large, of itself does not give the appraiser the authority to ignore actual sales of the stock. (Matter of Smith, *supra*.) The method of fixing value by ascertaining the value of assets and good-will should only be resorted to when there are no sales from which it can be ascertained.

Considering all of the sales and the testimony of the treasurer as to the value and allowing for a possible depression between the date of death and of the public sale on account of the existence of the European war, I am of the opinion that a fair value of said shares for purposes of taxation on the date of decedent's death was forty-four dollars.

If the appraiser was right in giving no weight to the sales public and private, nor to the opinion of the treasurer of the company, then we come to a consideration of the method adopted by him in ascertaining the value of the good-will.

During the twenty months of the corporation's existence, the profits were large, and the appraiser has estimated the value of its good-will by taking a six years' purchase on the average net annual profit over an allowance of six per cent. on capital invested.

The general method followed by him for ascertaining the value of good-will, namely, taking a number of years' purchase and multiplying the average annual profits thereby, has received the sanction of courts of original and appellate jurisdiction. (Matter of Silkman, 121 App. Div. 202; *Von Au v. Magenheimer*, 115 id. 84; 126 id. 257; *affd.*, 196 N. Y. 510.)

Hence it only remains to consider whether the number of years' purchase which the appraiser took, was, under the circumstances, warranted. He justifies his taking a six years' purchase, although the corporation was only in existence for one year and eight months, by the contention that it was carrying on

the business of the Mutual Milk and Cream Company. The latter corporation was organized in 1899 or 1900, and upon the organization of the Central Dairy Company as stated in May, 1912, the stockholders of the Mutual Milk and Cream Company were given the privilege to subscribe for stock in the new Central Dairy Company. The Mutual Milk and Cream Company **then transferred to the Central Dairy Company** certain personal property, fixtures and the good-will of the wholesale business of the Mutual Milk and Cream Company in the boroughs of Manhattan and The Bronx and of all wholesale routes of said company, **excepting certain contracts with some seventy firms named.** The said agreement, however, contained a provision that nothing therein contained should be held or construed as limiting or restraining the right of the parties to compete in the wholesale milk business after a date about three months thereafter. It appears that in consideration of the Mutual Milk and Cream Company agreeing not to compete with the Central Dairy Company in the wholesale routes for three months the Central Dairy Company paid the sum of \$62,500.

The new company, therefore, was not doing business under the name of the old company, and after the expiration of three months might be forced to compete with the old company. Under such circumstances, I do not see force in the contention that it was practically the old corporation and enjoyed its good-will.

In the case of *Commissioners of Inland Revenue v. Muller & Co.'s Margarine, Ltd.* (L. R., App. Cas. 1901, p. 217, at 223), **Lord MACNAGHTEN defined good-will as follows:** "It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start." And in *People ex rel. A. J. Johnson Co. v. Roberts* (159 N. Y. 70) the Court of Appeals cites and quotes from a number of English cases and

then observes: "Good will embraces at least two elements, the advantage of continuing an established business in its old place, and of continuing it under the old style or name. While it is not necessarily altogether local, it is usually to a great extent, and must, of necessity, be an incident to a place, an established business or a name known to the trade."

In the matter before the court, the name under which the new corporation carried on business was not the same as that of the old firm. There were no trademarks, brands or other distinguishing business devices of the old firm used by the new one, and, while the term good-will was used in the instrument of transfer, the fact appears to be that the old company gave the new one the right to do business for three months with certain of its customers without molestation from or competition with the old corporation. When the three months were over, the old company had the right to compete with the new one, and certainly under such conditions the latter cannot be said, at least after that time, to have enjoyed the good-will of the former.

Good-will should be based upon a calculation of profits before the death of the decedent (*Matter of Silkman, supra*), and the life of a corporation should be one of the elements considered. (*Matter of Demarest, N. Y. L. J., May 7, 1914.*)

Under the circumstances, the taking of a six years' purchase was not proper in my opinion. A careful examination of the cases fails to disclose one in which the years of purchase were more than the total life of the corporation. Thus, in *Matter of Ball* (161 App. Div. 79), the average annual profits were multiplied by two, the corporation being seven years old; in *Matter of Silkman (supra)* the same were multiplied by two, the corporation having been in existence nineteen years; in *Von Au v. Magenheimer (supra)*, the same were multiplied by six, the life of the corporation being over ten years; in *Matter of Keahon* (60 Misc. Rep. 508) they were multiplied by three, the corporate existence being fifteen years; in *Matter of Weatherbee*

(N. Y. L. J., Nov. 5, 1913) they were multiplied by five, the life of the corporation being thirty years, and in *Matter of Gumbinner* (N. Y. L. J., Oct. 19, 1915) the purchase was two years and the life of the corporation eighteen years.

It will be seen from these matters that there is no fixed rule for taking any specific number of years' purchase of the average profits. In *Von Au v. Magenheimer* (*supra*) the Appellate Division said that the number of years' purchase that were to be taken was a question of fact.

If the appraiser was right in disregarding the sales and the testimony of the treasurer and in basing his valuation entirely on the so-called book value of the stock plus the value of the good-will, then, I think that under all the circumstances a more just result would have been reached if he had taken the actual net profits made during the life of the corporation, about twenty-months, as being the value of the good-will instead of a six years' purchase of the average annual profits. If this be done and the figure thus obtained be substituted for that obtained by the appraiser as the value of the good-will, the total net value of the shares would be only slightly in excess of the amount at which I have arrived.

I accordingly hold that the said shares should have been appraised at forty-four dollars per share. The appeal is sustained, the order reversed and the report remitted to the appraiser for correction as indicated.

Appeal sustained and order reversed.

Matter of the Estate of WILLIAM MAY, Deceased.

(*Surrogate's Court, New York County, December, 1915.*)

EXECUTORS AND ADMINISTRATORS—WHEN BALANCE PAID TO ADMINISTRATOR—EVIDENCE.

Where claimant received from decedent, a feeble and illiterate old man, certain money upon the understanding that out of it should be paid his living expenses and the cost of his burial, the balance must be paid over to the administrator in the absence of clear and adequate proof that claimant is entitled to retain it.

DISCOVERY proceeding.

Walter A. Sweet, for administrators.

Peter P. McElligott, for respondent.

FOWLER, S.—This is a discovery proceeding before me. I am satisfied that Mr. Anderson received some money from Mr. May, a feeble and illiterate old man, and that the understanding was that out of it he should pay Mr. May's living expenses and the cost of his burial. There is no dispute about the amount so received. Mr. Anderson's claim is that he was entitled to retain the balance. With the evidence of this claim I am not satisfied. Such a claim must always be established by clear and adequate proofs. Consequently the balance remaining in his hands, after deducting all the payments made to or for the use of the deceased, must be paid over to the administrator. As this resembles an equitable proceeding, the administrator must do equity as a condition of relief, and I shall be very liberal in allowing deductions for sums actually expended.

Decreed accordingly.

Matter of the Estate of WILLIAM LAWRENCE BREESE and
HAMILTON FISH BREESE, Infants.

(Surrogate's Court, New York County, December, 1915.)

GUARDIANS—APPLICATION FOR ANCILLARY LETTERS OF GUARDIANSHIP—CODE
CIV. PRO., § 2654(2).

Under section 2654(2) of the Code of Civil Procedure an application for ancillary letters of guardianship must be made by the person authorized to act as guardian within the county where the infant resides, but no provision of said Code authorizes the surrogate to issue joint letters of guardianship.

APPLICATION for ancillary letters of guardianship.

Marvin, Hooker & Roosevelt, for petitioner.

FOWLER, S.— This is an application for the grant of ancillary letters of guardianship to the petitioners as joint ancillary guardians. Under section 2654, subdivision 2, the application for ancillary letters must be made by the person authorized to act as guardian within the county where the infant resides. Section 2655 provides that if the surrogate is satisfied that the case is within section 2654, and "that it will be for the ward's interest that ancillary letters of guardianship should be issued to the petitioner," he may grant letters of guardianship accordingly. This section merely provides for the granting of letters to the petitioner, and not to the petitioner and another person jointly. There is no provision of the Code which authorizes the issuance of joint letters of guardianship in the Surrogate's Court. The decree should provide for the issuance of ancillary letters to Julia Fish Breese.

Decreed accordingly.

Matter of the Estate of HENRY KLATTE, Deceased.

(*Surrogate's Court, New York County, December, 1915.*)

LEGACIES—SPECIFIC AND GENERAL—PAYMENT OF DEBTS AND EXPENSES.

Certain legacies held to be specific and another general and the assets of the estate to be applicable to the payment of debts and expenses as follows: First, the unbequeathed personalty as to which testator died intestate, and, second, a general legacy and then the specific legacies.

OBJECTIONS to account by a special guardian.

Reynolds & Geis (Richard A. Geis, of counsel), for executors.

William J. Burke, special guardian.

FOWLER, S.—The special guardian's objections are sustained as follows: The legacies contained in the fourth and fifth clauses of the will are specific legacies. (Estate of Beckett, 15 N. Y. St. Repr. 716.) In Roper & White on Legacies (Vol. 1, p. 199) it is said: "Following then the same principle, viz., the intention of testators, if a testator direct his freehold or leasehold estates to be sold, and dispose of the proceeds in such a form as to evince an intention to bequeath them specifically, the testamentary dispositions will be specific, the money is sufficiently identified and severed from his other property; and since he has sufficiently marked his intent to distribute the identical proceeds, the bequests are accompanied with all the requisites of specific legacies.

"An instance of this kind occurred in *Page v. Leapingwell* (18 Ves. 463); see also *Newbold v. Roadnight* (1 Rus. & M. 677). In that case A. devised to B. real estates in trust to sell, but *not for a less* sum than £10,000; and he directed B., out of the monies arising from the sale, in the first place, to lay out

the sum of £3,000 in purchasing a benefice for his godson, C. He also directed B. by and out of the monies arising from such sale as aforesaid, to lay out the sum of £4,000 in the purchase of lands in the county of Essex, as his nephew D. should choose; and he further directed B., by and out of the monies arising from such sale as aforesaid, to place the sum of £500 at interest in the funds in his own name, and to pay the dividends to E. for life, and afterwards to divide the principal as therein mentioned. The testator then gave three legacies of £100 each, and directed B. after payment of the above legacies, to invest in the public funds *all the overplus monies arising from the sale* of his said real estates, and to pay the dividends to F. and G. equally. The testator then proceeded to dispose of other parts of his property, and concluded with a *general* residuary bequest. The proceeds from the sale of the lands were less than £7,000. The questions were, whether the legacies were specific? and if so, whether F. and G. were entitled to any part of the fund with the other legatees, since what was given to them appeared to be residuary; and Sir W. Grant, M. R., was of opinion that the legacies were specific, upon the principle that the testator *assumed* he had at least £10,000 proceeds from the sale to dispose of, and that he portioned them out among the legatees. His Honor also considered the testator to mean that F. and G. should take at least what should remain after payment of the specific legacies, viz., £2,200 (the testator assuming that the proceeds would amount to £10,000, but if to more, then intending them the excess). The determination was, that if the lands had produced £10,000 the shares of F. and G. in it would have been £2,220; F. and G. were therefore entitled to so much of that sum as remained, after abating ratably with the other specific legatees."

In Williams on Executors (Vol. 1, p. 921) it is said: "Again, where the bequest was 'to my granddaughter the sum of £40, *being part of a debt* due to me for rent from A, she allowing what charges shall be expended in getting the same:

Item, I bequeath to my grandsons C. and D., the rest and residue of what is due to me from the said A., which is about £40 more, in equal shares, and they allowing charges as aforesaid; 'these were held specific legacies. (Ford v. Fleming, 1 Eq. Cas. Abr. 302, pl. 3.)"

The legacy in the sixth clause is a general legacy. (Tift v. Porter, 8 N. Y. 516; Matter of Werle, 91 Misc. Rep. 402.) The assets are applicable to the payment of debts and administration expenses in the following order: *First*, the unbequeathed personalty as to which the testator died intestate; *second*, the general legacy contained in the sixth clause of the will, and last of all the specific legacies. The expenditure for the burial plot will be approved and the special guardian's objection to that item overruled. Let a decree be submitted on notice adjusting the account accordingly and tax costs.

Decreed accordingly.

Matter of the Estate of FREDERICK ROBITSCHER, Deceased.

(*Surrogate's Court, New York County, December, 1915.*)

WILLS—PROVISIONS OF—ADDITIONAL EXECUTORS—APPLICATION FOR APPOINTMENT OF ADMINISTRATOR WITH WILL ANNEXED.

Where a will provides for additional executors in the event that testator's wife, the principal legatee and sole executrix, should not survive him, but no provision is made for the event of her death after the grant of letters testamentary to her, the proper course upon her death is to apply for the appointment of an administrator with the will annexed.

APPLICATION for letters testamentary.

Emilie M. Bullowa (Lawrence E. Brown, of counsel), for petitioner.

FOWLER, S.— This is an application for letters testamentary. The testator appointed his wife sole executrix. He then named Benedict Joseph and two other persons, the appointment of all as executors to become effective in the event that his wife should die before he did, "*and not otherwise.*" In the first codicil he named Frederick B. Joseph in place of Benedict Joseph, deceased, and declared that his will should be construed as though the name of Frederick B. Joseph were inserted therein instead of the name of Benedict Joseph. By the second codicil he confirmed his will in all respects, in the event that his wife survived him; he recited the previous change in executors, stated that Frederick B. Joseph had died, and then in similar language to that used in the first codicil provided as follows: "I am desirous that Arthur M. Bullowa (the applicant) shall be substituted as a trustee and executor of my said will *in the place and stead* of the said Frederick B. Joseph, deceased, and I do hereby make, constitute and appoint the said Arthur M. Bullowa one of the executors and trustees of my said will and codicil." The single clause above quoted, on which the applicant rests his contention, is as follows: "and I do hereby make, constitute and appoint the said Arthur M. Bullowa one of the executors and trustees of my said will and codicil." The will was probated in the year 1912. Letters testamentary were issued to Esther Robitscher, widow of the testator. She acted as executrix of the will until her death, which occurred in November, 1915. There is now no representative of the estate, and Arthur M. Bullowa applies for letters testamentary. It is a well-established rule that where there is an uncertainty regarding the appointment of an executor the intent of the testator must be sought, and that slight expressions in his will may suffice to determine such intent. It is clear that had Benedict Joseph survived the widow he would not have been entitled to letters testamentary. If the widow survived, she was to be the principal legatee and sole executrix. If she did not survive, other trusts were created and other

executors and trustees appointed. Had Frederick B. Joseph survived the widow he could not have received letters, as he was expressly named in place of Benedict Joseph. It appears that the substitution of Arthur M. Bullowa for Frederick B. Joseph was essentially of the same character as the substitution of the latter for Benedict Joseph. The single clause on which the applicant depends cannot be considered independently from the language immediately preceding it, which is similar to that used in filling the first vacancy. The testator merely made provision for the additional executors in the event that his wife should not survive him. He made no provision for the event of her death after receiving letters. The cases cited in support of the application I think are not in point. The proper course is to seek the appointment of an administrator with the will annexed.

Application denied.

Matter of the Estate of MARTIN GROSSMAN, Deceased.

(Surrogate's Court, New York County, December, 1915.)

ACCOUNTING IN SURROGATE'S COURT—EXECUTORS AND ADMINISTRATORS—TESTAMENTARY TRUSTEES—WHEN EXECUTORS ENTITLED TO FULL COMMISSIONS—CODE CIV. PRO., § 2753.

Since September 1, 1914, commissions to testamentary trustees upon an accounting in the Surrogate's Court must be allowed in accordance with section 2753 of the Code of Civil Procedure, the last paragraph of which provides that "If the gross value of the principal of the estate or fund accounted for amounts to \$100,000, or more, each executor, administrator, guardian or testamentary trustee is entitled to the full commission on principal and income allowed therein to a sole executor, administrator, guardian or testamentary trustee," and not under section 3326 of said Code.

The gross value of the principal of an estate is the determining factor as to whether or not two testamentary trustees shall each be entitled to full commissions on principal and income and the amount of the latter has nothing to do with the right to more than one full commission.

Where the gross value of the principal of an estate consists of unsold real estate which is not to be distributed or delivered, it cannot be taken into consideration so as to bring the value of the estate beyond \$100,000.

Principal and income may not be added together in order to make an estate of over \$100,000 and thus entitle each trustee to full commissions.

Where the principal of a trust estate as accounted for amounts to \$84,578.78, and the income accounted for amounts to \$136,106.34, the two testamentary trustees may be allowed one full commission to be divided between them.

PROCEEDING upon the judicial settlement of the account of trustees.

Thornton & Earle, for trustees.

FOWLER, S.— Upon the judicial settlement of this account of the two trustees under the last will and testament of the above-named deceased, a question as to the right of each trustee to full commissions is presented by reason of the fact that the principal accounted for amounts to \$84,578.78 and the income accounted for amounts to \$136,106.34. The accountants claim that they are each entitled to full commissions, but this does not appear to be correct. Prior to September 1, 1914, trustees' commissions upon accountings in this court were allowed in accordance with the provisions of section 3320, Code of Civil Procedure, but the revision of 1914 adopted in part the language of section 3320 and incorporated it into section 2753 and made that section in terms apply to trustees, so that now trustees accounting in this court will have commissions allowed in accordance with section 2753, and not in accordance with section 3326. The last paragraph of section 2753 provides that "if the gross value of the principal of the estate or fund accounted for amounts to \$100,000 or more, each executor, administrator, guardian or testamentary trustee is entitled to the full commission on principal and income allowed therein to a sole executor, administrator, guardian or testamentary trustee. * * *

It will, therefore, be seen that the gross value of the principal estate or fund is the determining factor as to whether or not two trustees shall each be entitled to full commissions on principal and income and that the amount of the income has nothing whatever to do with the right to more than one full commission. The accountants further maintain that the *gross* value of the principal of the estate or fund does amount to several hundred thousand dollars, but it appears from their memoranda that this gross principal to which they refer, but which is not the subject of this accounting, consists of parcels of real estate, upon which commissions cannot be allowed, as it is unsold and is not to be *distributed or delivered* (Code Civ. Pro., § 3753, par. 5), and it, therefore, cannot be taken into consideration so as to bring the value of the estate beyond \$100,000. (Chisolm v. Hamersley, 114 App. Div. 565, this case being decided under the provisions of section 3320, which have now been incorporated in section 2753; Estate of Dimon, N. Y. L. J., Oct. 31, 1914.) Neither can principal and income be added together in order to make an estate of over \$100,000 and thus entitle each trustee to full commissions. (Matter of Willets, 112 N. Y. 289; Slossom v. Naylor, 2 Dem. 257, referred to in Chisolm v. Hamersley, *supra*.) The trustees will, therefore, be allowed one full commission to be divided between them. The account and decree in all other respects appear to be correct, and when the decree is altered to comply with this decision it will be signed.

Decreed accordingly.

Matter of the Estate of AMOS F. ENO, Deceased.

(Surrogate's Court, New York County, December, 1915.)

EXECUTORS AND ADMINISTRATORS—COMMISSIONS ALLOWED TEMPORARY ADMINISTRATORS—SURROGATE'S COURT.

The amount of commissions to be allowed to temporary administrators cannot be determined in advance of the judicial settlement of their accounts, and any provision in the order appointing them limiting or determining the amount of such commissions must be stricken out.

An order appointing one as a temporary administrator should not provide that he serve without compensation, and where his appointment was conditioned upon his consenting to serve without compensation such consent should be filed in the Surrogate's Court before the order appointing such administrator is signed.

MOTION for appointment of temporary administrator.

Henry deForest Baldwin, for executor.

Nash & Jones, for Columbia University of city of New York.

DeForest Bros., for Metropolitan Museum of Art.

Charles H. Beckett, for Gifford Pinchot and Amos R. E. Pinchot, contestants.

Arthur C. Train, for Henry Lane Eno, contestant.

Simpson, Thacher & Bartlett, for William P. Eno, contestant.

Sullivan & Cromwell, for Antoinette E. Wood, Florence C. Graves and Mary P. Eno, contestants.

FOWLER, S.—A motion having been made by the trustees of Columbia University in the city of New York, the residuary legatee and devisee named in the paper submitted for probate

as the last will and testament of Amos F. Eno, deceased, for an order appointing temporary administrators of the estate of the decedent, and the motion having been duly heard, proposed decrees upon the said motion have been now submitted by the residuary legatee and by the contestants. The proposed decrees attempt to provide for commissions or compensation to which the temporary administrators may be entitled. The question of commissions cannot be determined by the surrogate until the judicial settlement of the accounts of the temporary administrators, therefore any provision in the proposed decree limiting or determining the amount of such commissions must be stricken out. The proposed decrees also contain a direction that William P. Eno shall serve as temporary administrator, without compensation. Mr. Eno's appointment was conditional upon his consenting to serve without compensation, and his consent to this condition should be filed in this court before the order is signed. The order should not contain a provision directing that he serve without compensation. I observe that the parties agree that the United States Trust Company shall be named as the depository. I am always pleased to have the parties agree when I think it is not inconsistent with the public interests. In this instance the selection is eminently proper. But that part of the proposed order submitted by the residuary legatee which directs that the United States Trust Company shall receive and collect the principal and the interest of securities should be struck out, as the United States Trust Company is named as a depository, and the court cannot impose upon it the active duty of collecting securities. This duty is properly placed upon the temporary administrators in folio 13 of the proposed decree presented by Messrs. Nash & Jones. That part of folio 17 which authorized the temporary administrators to take possession of the personal property should also be struck out, as it is merely declaratory of the law. (Code Civ. Pro., § 2597.) The last paragraph, which directs the temporary administrator to

afford the attorneys for the contestants an opportunity to inspect and examine the papers, books and documents belonging to the decedent, should also be stricken out, as the court has no power upon this motion to make such an order. In so far as the papers in the hands of the temporary administrators may be regarded as *in custodia legis*, my desire will be that either the members of the testator's family or his residuary legatee should have the fullest disclosure possible consistent with the justice due to the testator's wishes in regard to his private and irrelevant papers. If it should become necessary for the attorneys for the contestants or the attorneys for the residuary legatee to have an inspection of any of the books or papers of the decedent they may apply to the court in conformity with the provisions of section 803 and section 809, Code of Civil Procedure. (Dale v. Stokes, 5 Redf. 586; affd., 28 Hun, 564.) The proposed decree submitted by the residuary legatee should be changed so as to conform to this decision and as then corrected presented to me for signature.

Decreed accordingly.

Matter of the Estate of EDITH O. GILL, Deceased.

(*Surrogate's Court, New York County, December, 1915.*)

WILLS—CONSTRUCTION OF—LIFE TENANTS—TRUSTEE IN BANKRUPTCY—EXECUTORS AND ADMINISTRATORS.

The construction of a will as determined by the Court of Appeals must be followed in the decree made upon the judicial settlement of the accounts of the administrator with the will annexed.

While a life tenant is still living, the trustee in bankruptcy of one entitled only to an interest in the estate in remainder is not entitled to a construction of the will, or to an adjudication in reference to the remainder, and the decree to be entered upon the judicial settlement of the accounts of the administrator with the will annexed should contain no adjudication in relation to the interest of the bankrupt.

PROCEEDING upon the accounting of an administrator with the will annexed.

Anderson & Anderson, for executor.

Henry Necarsulmer (Max J. Kohler, of counsel), for trustee.

Walmsley & Kohlman, for Edward E. Elder.

Andrew S. Hamersley, special guardian.

FOWLER, S.—The administrator with the will annexed of the estate of the testatrix having died, his executor has filed an account of his proceedings as such administrator. The special guardian appointed by this court to represent certain infants mentioned in the petition as having an interest in the estate filed his report, and exceptions thereto have been filed by the trustee in bankruptcy of a person having a vested interest as remainderman. There is no provision in the sections of the Code of Civil Procedure relating to Surrogates' Courts, nor in the rules of this court, which authorizes the filing of exceptions to a special guardian's report. Such a report is made for the purpose of acquainting the court with the nature of the infant's interest, the manner in which such interest has been conserved by the accounting party, and the extent to which it is protected by the proposed decree. It is not a finding upon any question of law or fact which is binding on any party to the accounting. Therefore, it is not the proper practice to file exceptions to the findings or recommendations contained in such a report. However, as the question of law presented by the exceptions to the special guardian's report is the same as that presented by the decree submitted by the trustee in bankruptcy, the court may properly consider it at the time the proposed decree is noticed for settlement. The decree submitted by the trustee in bankruptcy con-

tains a clause adjudging that a certain devise and bequest under the will of the testatrix passed a vested remainder to the bankrupt, that such remainder was not subject to be divested by his death before the life tenant, and that the interest of the bankrupt became the exclusive property of the trustee in bankruptcy upon his appointment as such trustee. This would be, in effect, a construction of the will of the testatrix. But the Court of Appeals has already construed her will (*Riker v. Gwynne*, 201 N. Y. 143), and that construction will be followed in any decree entered in this court. Moreover, the trustee in bankruptcy is entitled only to an interest in the remainder, and as the life tenant is still living such remainder is not distributable at this time, and is not affected by the present accounting. Therefore the trustee in bankruptcy is not entitled to a construction of the will at the present time or to an adjudication in reference to the remainder. The decree to be signed upon this accounting, therefore, will not contain any adjudication in relation to the interests of the bankrupt. Costs taxed. The decree presented by the petitioner should be completed by inserting the proper amounts.

Decreed accordingly.

Matter of the Estate of MRS. FRANK LESLIE, Deceased.

(*Surrogate's Court, New York County, December, 1915.*)

WILLS—CONSTRUCTION OF STATUTES—DECREE OF PROBATE—DECEDENT ESTATE LAW, § 91.

The statute (Decedent Estate Law, § 91), providing that when an inheritance shall have come to the intestate from a deceased husband or wife the inheritance shall descend to the heirs of such deceased husband or wife if the intestate leave no heirs entitled to take, does not create a new class of heirs at law, but in operation is tantamount to a gift from the state of its escheats or rights of what is known as caducary succession.

The donees of the state stand in no better position than the state and may not contest the probate of the wife's will in order to promote the state's escheat.

The statute cannot be construed as a release from the state, as the husband's heirs at law have not a title to support the release.

A regular decree of probate is a decree *in rem* and cannot be set aside at the instance of those not entitled to be cited to attend the probate proceedings, and should not be opened to let in the successors to the state to contest the probate.

APPLICATION for leave to open decree admitting will to probate.

James H. Westcott (Alfred B. Cruikshank, of counsel), for Arthur Leslie, petitioner.

Edgar T. Brackett and Hiram C. Todd, for Louis H. Cramer, executor.

Sullivan & Cromwell, for William Nelson Cromwell, executor.

Horace E. Parker, for residuary Carrie Chapman Catt.

William A. Young, for Maynard D. Follin.

George A. Strong, for Mrs. Wrenn.

FOWLER, S.— This application by those who are neither heirs at law nor next of kin of Mrs. Leslie for leave to come in and open our decree admitting her will to probate and contest the validity of such last will and testament, disposing of an estate which she held in full property, or as it is technically termed in fee simple absolute, is both novel and important. The application depends wholly on a recent statute of this state, to which I shall hereafter refer. No similar statute is to be found among the laws of any of the civilized states of Europe. The statute

this drawn into consideration operates as a dislocation of the frame of the ancient law of English-speaking peoples. It has no parallel outside of some few American states. In considering this statute I have found no precedents of authority to guide me, and therefore I am compelled to invoke the fundamental principles of our jurisprudence in order to determine the rights of the parties claiming under it.

I regret that this is one of the cases where I must resort to arguments and sources of law not depended on by the counsel in the cause, because my conscience imperatively prompts me to find elsewhere than in their briefs and arguments the reasons of my judgment. I say this only in order to relieve counsel from any responsibility in the event that those reasons shall not ultimately commend themselves to the judgment and conscience of those superior to me in authority and in responsibility.

The decree now sought to be opened probating the last will and testament of Mrs. Leslie was passed in a proceeding where every requirement exacted by law was complied with; all the persons directed by the law of the land to be cited to attend the proceeding were duly cited. The decree itself was in every respect regular. The jurisdiction of the court to render it was complete. Such a decree is one *in rem*, and declared by old and solemn authority, often reiterated, to be binding on all the world, including the petitioners. (Bogardus v. Clarke, 4 Paige Ch. 623; Hoyt v. Jackson, 2 Dem. 443, 456; Matter of Lasak, 131 N. Y. 624; Heyer v. Burger, 1 Hoff. Ch. 1, 11; Matter of Wood, 8 N. Y. Supp. 884; Anderson v. Anderson, 112 N. Y. 104, 113; Matter of Kellum, 50 id. 298; Vanderpoel v. Van Valkenburgh, 6 id. 190, 199; Roderigas v. East River Sav. Inst., 63 id. 460; Kelly v. West, 80 id. 139, 145; Matter of Killan, 172 id. 547, 564; Stiles v. Burch, 5 Paige, 132; Whicker v. Hume, 7 H. L. Cas. 124; Concha v. Concha, 11 App. Cas. 541; Pinney v. Pinney, 8 B. & C. 335; Pinney v. Hunt, 6 Ch. Div. 98; Jones Ev., §§ 609, 610.) On such a decree persons

wherever residing had a right to rely not only by the settled law of our own country, but by the settled law of the entire civilized world. Purchasers *bona fide* could acquire titles under such decree, and these titles cannot now be divested, unless all the principles governing decrees *in rem* are subverted. I regret to notice that it is sometimes said by publicists, and I fear not without some foundation in fact, that in some of the courts of this country we pay too little respect to the solemnity and conclusiveness of decrees *in rem*. This, if true, tends to belittle us in the courts of nations, known as the public courts.

When we come to resolve a cause of first impression, we should always enquire *in limine* concerning the *status* of the actors or petitioners and their title to the relief sought. Every right and title recognized in American courts of justice flows either from the common law, the constitutions of government or from competent statutes. No other title or right is recognized in the courts of this state unless the parties are domiciled elsewhere, or the title, right or chose in action originated out of this state. This last exception denoted is not applicable here. The promovents now here seeking relief depend solely on the recent statute of this state, to which I have before referred. They derive no support from the common law or from any section of the constitutions of government. They must stand or fall by the act I am about to specify. (Laws of 1901, chap. 481, afterward made section 290a of chapter 547, Laws of 1896, and now transferred to section 91 of the Decedent Estate Law.) This statute is in terms as follows: "When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate."

What does this statute mean? It does not purport to be an amendment to our ancient statute of distributions making a new class of kindred known to the law as "next of kin." It cannot, I think, be supported as an attempt to raise up a new class of heirs at law. It is an old principle of our common law "that God only, and not man, can make an heir at law. (Glanville, VII. 1.)" Let us glance, by way of preliminary illustration, at some of the things the legislature cannot do. In a common law state of this federation it must be conceded that there are many things which the legislature cannot do although the constitution may not expressly prohibit them. They cannot, for example, reconstruct a family, at least without the consent of the family. They cannot declare that if a man die without surviving him a lawful wedded wife the women folk found resident in his house at the time of his decease shall have a title of dower in the order of their seniority. The legislature cannot declare that if a man die without heirs at law or next of kin then the people in the next house shall succeed to his estate. Mr. Leslie's heirs at law are in no different category, when the state comes to deal with Mrs. Leslie's estates in fee simple absolute, from the people next door.

A word more on the nature of the powers of legislation intrusted to American legislature. It is a principle of American public law that our legislatures cannot enact any law contrary to "natural right." The modern English theory of the omnipotence of parliament has no place in our public law. It had once no place in the common law of England. A great English judge, Lord Chief Justice HOBART, in the reign of James I, in the case of Day v. Savage (Hobart's Reports 87) said by the common law: "Even an act of parliament made against natural equity as to make a man a judge in his own case, is void in itself, for *jura naturæ sunt immutabilia* and they are *leges legum*." This great principle, accurately stated by Lord Justice HOBART, has disappeared from the law of England in ways I shall not stop to recite. It fortunately survives in our common and public law.

In this respect our public law continues the better traditions of the law of English speaking peoples. All will admit that an American legislature could not, for example, reenact the Herodian decree, that all infants born within two months before the act should perish. Nor can it take away the property of A and give it to B, although there is no definite constitutional restriction which prevents either of the absurd and improbable acts suggested by way of illustration only. Of course, all such legislation is prohibited, but only inferentially or by cross reference to the rules of the common law. The application of all this extreme hypothesis to this proceeding now in this court is this, That no matter the source from which Mrs. Leslie's estates in fee simple absolute have sprung they became her property and beyond the control of the legislature, except in certain very well settled and limited appropriations for public uses.

I do not in reality ascribe to the legislature any such fatuity as an attempt by the act under consideration to raise up a new class of heirs at law to Mrs. Leslie or to any man or woman dying seized of real property. A legislative act must always receive a rational interpretation. It must be reconciled, if possible, with justice and good sense. It is very obvious to me that the real intention of the act was to provide for some of those numerous cases where the state acquired, or was about to acquire, for default of heirs (*propter defectum sanguinis* as it is called), escheats or rights of escheat by virtue of its sovereign paramountcy over all ownerless things within its territorial domain. The act in question intended that in that event, and in that event only, the rights of the state should devolve on the class designated in the act. That it was within the power of the legislature so to enact, I shall assume without present inquiry, however open to doubt the point may be under the provisions of the Constitution restricting the disposition of the public wealth. It is unnecessary to restate the familiar principles on which the state's title to escheats without office found rests. It would only prolong

this opinion unnecessarily. Nor is it necessary to pursue here the limitations on the power of the legislature to release its sovereign rights of escheat. That there are limitations on their right to release every lawyer knows. When the state parts with its property, however acquired, it parts with it under the general rules of property. As a release can run only to those having legal title, colorable or real, the act under review is not to be taken to be operative as a release to Mr. Frank Leslie's heirs at law, for that description of persons had no possible claim, colorable or otherwise, to the freehold estates of Mrs. Frank Leslie. In other words, his heirs could not take her estate by release even if running from the state.

The rights, if any, of the heirs at law of Mr. Frank Leslie to succeed to the estate in fee simple absolute of Mrs. Frank Leslie under the act in question can only be regarded as a gift from the state. If this is accurate, they can acquire by gift from the state no better right or different right than the state itself has to such freehold estate. "*Non debeo melioris conditionis esse quam auctor meus a quo jus in me transit*" is a maxim not only of the civil law, but of the common law as well. I believe there is no known exception to the rule of law stated in this maxim. This being so, we must next enquire what rights can the state be held to have intended to confer on the heirs of Mr. Frank Leslie in the separate freehold estates formerly of Mrs. Frank Leslie.

It has never been understood that the ultimate right of the state in what is known as caducary successions, including escheats, entitled it to contest the probate of a will of an heirless person in order to promote its right to escheats. The will of an heirless testator stands free from attack in that quarter. It would be contrary to public policy and to all principles of the common law, nay, contrary to all rights secured to our citizens by our constitutions of government, if the state could promote its caducary succession by a resort of that kind to its own courts of justice. The only remedy of the state for escheats is by way of

office found, or its substitute. If the state had itself no right, power or authority to contest the probate of a will of an alleged heirless man or woman, then under the great maxim already quoted those succeeding to its rights stand in no better position. I therefore hold that the heirs of Mr. Frank Leslie are strangers to this probate proceeding, and that they have no right or title which justifies their present application in this court. This court in the probate proceeding has obeyed all the mandates of the law, and it has cited to the probate all those persons that the law directed to be cited. It would, in my opinion, be highly irregular and contrary to all precedent and authority to vacate the decree of probate sought to be vacated at the instance of Mr. Frank Leslie's heirs at law, now claiming escheats in succession to the state of New York.

If the title or claim of Mr. Leslie's heirs to the freehold estates of Mrs. Leslie can only be supported as a gift from the state, then this court has no jurisdiction to enforce such gift. To enforce a gift from the state the heirs of Mr. Leslie must have recourse to the great general court of the state, now invested with the jurisdiction of the former chancellors. In an exceptional case that tribunal has complete jurisdiction to grant any relief which the facts justify. No such power exists in this court.

There are several other principles of law which ought, I think, to frustrate this application. The assertion of a servile status, or a status of illegitimacy, is not in law open to every one, and, indeed, after a great lapse of time it is open to no one. The common law of this land is full of adjudications on both these points. If a person had been for several generations a freeman, a private person cannot be heard to assert the contrary in a court of justice. A stranger cannot raise an issue of legitimacy. To permit such assertions is regarded as contrary to public policy. To allow Mr. Leslie's heirs at law to violate these plain principles would be repugnant to justice. It is only in cases where

pedigree is directly involved that pedigree evidence is admissible. This is not such a case. Mr. Leslie's heirs at law have no interest in the determination of Mrs. Leslie's heirs at law.

The unwisdom of any other construction of this act than that here accorded to it is exemplified by this case. When the common law said that God only made an heir it was replete with human and divine wisdom. Such heirs are naturally tender to the memory of ancestors. Their cupidity is bounded by the law of decency and propriety. Not for all the inheritances in the world would a freeman brand his mother or father, for example, as servile. It would be contrary to human experience and human instinct for blood relatives to stain their line. Any other construction of this act than that here accorded to it leads to the contrary actions and excites the worst passions of men.

But I ought not to dispose of this matter without some reference to the merits of the respective contentions of the parties. It is claimed in substance on the part of Mr. Frank Leslie's heirs at law that his widow could have no heirs at law of her own, as the only parent through whom such heirs could claim was by the *ante bellum* law of this country prior to 1861 held in a servile status; all such persons, like many in the Middle Ages, being what is known in the old law as "propertyless persons," and therefore not stocks or stirps of descent. Of course, such a claim seems to us now at this lapse of time a monstrous claim. But even if not monstrous in law, to my mind the evidence purporting to support the claim in this instance is of the most inadequate and nebulous kind. Besides, the claim of Mr. Leslie's heirs is met on the part of those claiming to be either the heirs at law and the legatees or devisees of Mrs. Leslie with most indignant and to my mind complete denials. In all countries where a servile status exists or has once existed, the free born and their descendants are for a long period of time thereafter outraged by charges detracting from their own superior status, or by what they regard as an unjust attempt to include them,

being of the higher caste, within the ranks of the servile caste. In view of this well-known fact, if for no other reason, this general indignation is not to be ignored in courts of justice. To my mind the cause of the indignation in this instance furnishes only another argument against a construction which would tend to bring those of alien blood within the description of heirs at law to one dying without heirs of her own blood.

On the merits of the papers presented in this matter it would seem that the origin, life and memory of the deceased lady are most unjustly attacked. It appears therefrom that all her life she was entirely free from all association with persons once of servile status; that she associated exclusively with persons not of that status, some of them more or less eminent as people of letters or in other walks of life. That she bore no trace whatever of the origin ascribed to her by the heirs at law of her late husband is apparent from the papers before me. The members of the highly respectable Southern family claimed by Mrs. Leslie as her own, and by whom she was claimed, repudiate in substance all such assertions. I must say that on the papers submitted to me the contention of Mr. Leslie's heirs at law in respect of Mrs. Leslie's status is entirely disproved. But for the other reasons already stated the application of Mr. Leslie's heirs at law must be dismissed.

Decreed accordingly.

Matter of the Petition of BROOKLYN TRUST COMPANY to Render and Settle its Intermediate Account as Trustee under the Will of ANNA K. WEAVER, Deceased.

(Surrogate's Court, Kings County, December, 1915.)

TRUSTS—CREATION BY WILL—LIFE BENEFICIARY.

Where a trust created by will is that the life beneficiary shall have the net income, all that the will assures to him is the income which must bear all the just and proper expenses of carrying the assets of the trust fund unless exonerated by the will.

PROCEEDINGS upon an intermediate account of a trustee.

Cullen & Dykman (Francis L. Archer, of counsel), for accountant.

David Joyce, for Leonard E. Willis, life tenant.

KETCHAM, S.—The life tenant under the trust which is the subject of this accounting objects that certain expenses have been improperly charged to the income instead of the principal.

The rule is that the just and proper expenses of carrying any of the assets of the trust, if incurred in a just and proper administration, must be borne by the income.

Where the trust is that the life beneficiary shall have the net income, all that the will assures to him is the income, less all the necessary expenses of mere maintenance. He then receives all which the will gives. His only misfortune is that the testator did not put into the trust in his behalf more or other property.

Unless it be found in the will, there can be no departure from this rule.

Says Mr. Justice DOWLING, in *Spencer v. Spencer* (169 App. Div. 54): "It is a settled rule that annual taxes and carry-

ing charges must be borne by the person having a life interest in the property unless there is an unmistakable direction to the contrary in the instrument creating the various estates therein. (*Pinckney v. Pinckney*, 1 Bradf. 269; *Booth v. Ammerman*, 4 id. 129; *Matter of Albertson*, 113 N. Y. 434; *Woodward v. James*, 115 id. 346; *Chamberlin v. Gleason*, 163 id. 214; *Matter of Tracy*, 179 id. 501.) It is to be noted that the income which is to be paid over to the testator's widow is 'the net annual income.' There is nothing in this will from which can be spelled out any intention upon the part of the testator that the carrying charges upon this property should be paid out of the principal of his estate or that it should not be deducted from the income. To insert such a provision in the testator's will would, it seems to me, be making a will for him and would not be construing the will which is actually made."

In its application to the case at bar, not only are the words quoted controlling, but the dissenting opinion in the case cited concedes and enforces the same proposition, for the sole endeavor of the dissent is not to deny that the income must bear the burden of such expenses unless exonerated by the will, but solely to show that there were in the will in question provisions which required that the principal should stand the expenses there involved.

In *Lawrence v. Littlefield* (215 N. Y. 561) there is neither ruling nor reasoning in favor of the claim of the life tenant in the case at bar. There the trust contained, besides personalty, large holdings of unproductive real estate, as to which, under an imperative power of sale, there was an equitable conversion from the moment of death. The lands were sold after "a considerable delay." No question arose as to the assessment of expenses of any kind upon either the income or the principal. It was only held, in accordance with the action that the land was converted into personalty upon the testatrix's death, that the life tenant should have from the proceeds of the delayed sale "a

sum as income during the period when he would have actually received income if the assumed intentions of the testatrix had prevailed."

The testatrix, under whose will this account is made, owned a mortgage. The will devised the residue, which included this mortgage, in trust "to pay over the net income arising therefrom" to this objectant during his life.

Without fault, and therefore wisely, the trustees took the mortgaged premises in merger of the mortgage. Still without criticism, and therefore wisely, the trustees paid the expenses which are the subject of objection. None of these were for additions or betterments, but were concededly for maintenance and preservation only. The trustees then, without criticism and wisely, took to themselves, in place of the property, moneys paid upon a loss by fire of buildings thereon, and further moneys received upon sale.

There was income from the assets of the trust other than the mortgage and lands already described, which income was more than the payments on account of the lands. There is nothing in the will as to the fund against which these payments should be charged, except the direction that the objectant shall receive the net income. The account is approved.

Decreed accordingly.

Matter of the Petition of JAMES L. MITCHELL et al., to Render and Settle Their Account as Executors of ALEXANDER ECTOR ORR, Deceased.

(*Surrogate's Court, Kings County, December, 1915.*)

DECEDENT'S ESTATES—CLAIM AGAINST—DECLARATION AS TO TRUST FUND—
EXECUTORS AND ADMINISTRATORS—WHEN CLAIM ALLOWED.

Where testator's daughter made a claim against his estate for \$18,000, which sum he had declared he held in trust for her and that in the event that she should acquire a house in his lifetime there would become due to her from him said sum, and throughout the remainder of his life he paid her the interest on said sum, his executors are in duty bound to pay over the principal of the trust fund only when testator's daughter shall actually and in good faith prepare for the building or purchase of a house, and her claim to said principal either as a debt due her in testator's lifetime or as one becoming due upon his death must be allowed.

PROCEEDINGS upon the account of executors.

Paul G. Gravenhorst, for executors.

Benedict S. Wise, for Jane Dows Nies, claimant.

John F. Burke, special guardian.

KETCHAM, S.—A daughter of the decedent makes claim against his estate for \$18,000, upon the following facts:

In 1895, her father having given, or engaged to give, to another daughter \$18,000, to be used by her in building a house then in progress, wrote to the daughter who is the present claimant in part as follows:

"As you are not yet certain about buying a house I propose until you do to pay the interest on the same sum that I am giv-

ing Juliet at $4\frac{1}{2}\%$ which is the rate that the money is invested at beginning the 1st of June * * * My wish is that you and Juliet should be treated alike from the financial point of view, and whenever you and Mr. Nies (the claimant's husband) are ready to purchase a house I will be ready to turn over the fund I have set apart for that purpose."

Later in the same year he wrote to the claimant: "My purpose was to put you and Juliet upon the same footing and as I have given her a house which would cost me a certain sum as of the 1st of August, 1895, I proposed to allow you interest on that amount from that date."

In 1909 he wrote: "The \$18,000 you speak of is invested with my other funds the income from it and that from your grandfather's estate helps to make up the yearly amount I deposit for you."

From the time of the first letter, and throughout his remaining life, the father paid to the claimant interest of \$18,000 at the rate of four and one-half per cent., with an exception about to be stated. In 1896, the claimant received from him \$1,500 which she shortly restored. During the time between the receipt and the reservation of the last named sum, the father's payment of interest was calculated only upon \$16,500.

The claim is entirely limited to the allegation that the decedent gave to the claimant the sum of \$18,000, which, however, he retained in his possession. There is no evidence to sustain the theory of gift.

It must result that there was a declaration by the father that he held the \$18,000 in trust for the claimant, abating for the moment the consideration of the precise terms and nature of the trust.

To the validity of this trust no act beyond the declaration was necessary. It was at least a trust to pay the interest. It was at least a trust under which in the event that the daughter should acquire a house in the lifetime of the father there would become

due to her from him the sum of \$18,000. This was not only his affectionate purpose; it was the enforceable duty to which he had submitted himself.

It remains only to determine whether the trust, in its founder's contemplation, involved an unqualified obligation to pay to the daughter at any time the sum of the trust fund or the self-imposed duty to make the payment only in case of her readiness and preparation to acquire a house. To support any present claim it would be necessary to find that the obligation of the trustee was one which was either broken by him in his lifetime or was of such nature that it matured immediately upon his death. Neither finding is permitted by the facts. Whatever was his duty while he lived is impressed upon his estate, and his representatives take no duty which did not rest upon him.

He undertook only to pay the principal of the trust fund when the beneficiary thereof should actually and in good faith prepare for the building or purchase of a house for herself and her husband. This duty descends upon his executors. They must fulfill the purpose of their decedent, but they must be no less careful to observe the limitations with which he hedged his trust than they should be to regard his affirmative obligation.

The claim to a sum of money as a debt of the decedent, due in his lifetime, or as one becoming due upon his death, is disallowed.

Decreed accordingly.

Matter of the Application of ANNA HERMENIA McDONALD et al., for a Decree Determining the Validity, Construction and Effect of the Disposition of Certain Real Property Made by the Wills of THOMAS McDONALD and MARY F. CLYNE, Deceased.

(*Surrogate's Court, Kings County, December, 1915.*)

DEVISE—OF CERTAIN REAL ESTATE—WILLS—EXERCISE OF POWER OF SALE.

Where testator's daughter to whom he devised certain real estate was given full power to dispose of the same by will "so that the absolute fee in possession will ultimately and within the statutory period vest in her brother's heirs," she had the legal right to dispose of the land as she chose, and any provision in her will which would vest the land in one or more of her brother's heirs ultimately at the end of one life in addition to her own would be a complete exercise of the power.

APPLICATION to determine the validity of the disposition of certain real property.

William P. Pickett, for petitioners.

Theodore Burgmyer (Lewis C. Grover, of counsel), for respondent, Edmond F. Clyne.

KETCHAM, S.—The will of Thomas McDonald, admitted to probate in this court, after mentioning his daughter, Mary F. Clyne, contained the following:

"*Fourth.* I give and devise to her my said daughter for life, those two certain houses and lots in the City of Brooklyn, N. Y., the one known and designated as No. 184 Pacific Street and the other as No. 351 DeKalb Avenue and I hereby give her full power and authority to dispose of both of said houses and lots by her last will and testament, reposing in her implicit trust and confidence that she will devise the same, so that the absolute fee in possession will ultimately and within the statutory period

vest in her brother's heirs, or in one or more of them whom she may, under the circumstances existing at the time of executing the power hereby given her, deem most in need and deserving of her bounty."

This provision was modified by a codicil, but without affecting the questions now presented.

Mary F. Clyne, the person named in the provision last quoted, died after her father's death, leaving a will which has been admitted to probate in this court, which contains the following:

"*First.* In pursuance of a power conferred upon me by the fourth clause of the last Will and Testament of my father Thomas McDonald, deceased, I give and devise to my husband Edmond F. Clyne, for his natural life, the premises situate and known as Number 184 Pacific Street in the Borough of Brooklyn, City of New York, and the premises situate and known as Number 367 DeKalb Avenue, in the said Borough of Brooklyn, City of New York, and at his death I give and devise said property to the children of my brother Thomas H. McDonald, deceased, and in case of the death of any of the said children before my said husband, the share of such deceased child or children to go to his or her issue."

The present proceeding must be confined to the construction of the father's will.

If the nature of the power conferred by the fourth paragraph thereof can be ascertained, there will be no legal provocation for any determination as to either the meaning or the practical effect of the daughter's will. Indeed, there is no conceivable uncertainty in the later instrument. Its disposition of the property involved in the power may be considered, but solely as a convenient limitation of the inquiry, Does the power respecting the premises mentioned in the fourth paragraph of the father's will give to the daughter the right to devise or appoint the same for life to a person not of the blood of the testator, with remainder, upon his death, to her brother's heirs?

If the power, primarily full and comprehensive, is not impaired or cut down by the expression of explicit confidence with regard to its exercise, then the paragraph yields nothing but the power to appoint by will and at will to such persons as the daughter shall select. If, however, the power is so characterized and restricted by this provision that it can be exercised only in such manner that "the absolute fee in possession will ultimately and within the statutory period vest" in one or more of the brother's heirs, it will need to be determined whether the power would permit the appointment of a life estate in a stranger to intervene before the fee should vest in the brother's heirs.

It will be the effect of the decree to be made in this matter, (a) that the recital of the testator's implicit trust and confidence that the daughter would devise the lands in the manner indicated was but an enclitic to his express grant of the power, not rising above a precatory appeal to her trustworthiness, (b) that the wish of the testator was imposed not upon the execution of the power but upon the daughter's conscience in its fulfillment, and (c) that hence she had a right untrammelled by law to dispose of the lands as she chose.

It will be further found that if the only power was to dispose of the lands "so that the absolute fee in possession will ultimately and within the statutory period vest in her brother's heirs," etc., then the only intention derivable from the language would be that any provision in the daughter's will which would vest the lands in one or more of her brother's heirs ultimately and at the end of one life, in addition to her own, would be a complete exercise of the power.

Decreed accordingly.

Matter of the Petition of LORENZ LOTZ and GEORGE W. LOTZ to Render and Settle Their Account as Executors of the Will of CHRISTINA B. LOTZ, Deceased.

(Surrogate's Court, Kings County, December, 1915.)

WILLS—DEVISE TO EXECUTORS IN TRUST—WHEN GIFT NOT DEEMED CONTINGENT.

Where a gift over is contained only in a direction to pay and devise at the end of an intermediate estate, the gift will not be deemed contingent if by the utmost effort and cunning a contrary intention can be detected in the will.

The will of testatrix, by which the whole income of all property derivable from the estate of her deceased father was given to her executors in trust to pay the income thereof to her husband for life, or while he remained a widower, directed the executors after the death or remarriage of said husband to divide the amount bequeathed to him into five equal shares or portions and to pay over one of said equal shares or portions to each of four named children of testatrix, the remaining share to be invested and the income therefrom to be paid to another daughter for and during her natural life and after her death the principal of said remaining share to be equally divided among the remaining children of testatrix share and share alike, and said children took the residuary estate equally.

Held, that the gifts to the four children were vested and not contingent; that the devise in trust for the fifth child vested in the trustees for her benefit subject to the contingencies of the trust, and that the share in remainder of one of said four children passed to her representatives.

PROCEEDING upon the account of executors.

Wilder, Ewen & Patterson (William M. Patterson, of counsel), for executors.

Thomas H. Troy, special guardian.

KETCHAM, S.—The will which must be applied in this accounting presents a disorder so eccentric that no general purpose

can be served by reproducing its terms for discussion. The best that the court can deduce from the instrument is that, containing much which cannot be understood, it has offered suggestions of an implied trust in the executors for the life and benefit of one of them, with remainder, and that this trust embraced in fact the whole estate. If this diffident conclusion be right, the questions which are presented in behalf of the infant child of a daughter of the testatrix will depend upon the inquiry, whether the gifts in remainder to the children of the testatrix were vested or contingent.

The will contains provisions with respect to property which the testatrix describes in these words: "The whole income which I now receive from the estate of my deceased father," "my share or portion thereof" (meaning of the said estate), and "the share or portion of my deceased father's estate." These words are taken to comprehend all property derivable from the father to which the testatrix then had right.

The fund is given in trust to pay the income thereof to the husband of the testatrix during his life or continuance as a widower. The gift over then proceeds as follows:

"*Fifth.* After the death or remarriage of my said husband I direct my Executors hereinafter named their survivor or successors to divide the amount bequeathed to my husband by the second clause of this my last Will into Five equal shares or portions (after paying in full any balance then due and owing upon said debt to my son George W.) and to pay over one of said equal shares or portion to each of my children namely Mary Louise Holts, George W. Lotz, Catharine Quinn and Josephine Keener, respectively,—The remaining one equal share or portion to be invested and the income derived therefrom to be paid to my daughter Caroline Dieffenbach for and during her natural life, and after her death the principal sum of said remaining share or portion to be equally divided between my remaining children share and share alike."

The seventh paragraph of the will is in part:

"Seventh. All the rest, residue and remainder of my Estate of whatsoever name and nature (after the death or remarriage of my husband) I direct my executors hereinafter named their survivor or successors To transfer and pay to my said children in equal shares or portions, share and share alike."

In the fifth paragraph there is something more than a direction to pay over and divide in the future.

The rule that such direction imports contingency in the gift is among those canons of construction which the appellate courts have been more zealous to escape than to obey. No doubt the rule, in its general form, rests in logical security upon the grammar, but it is equally sure that in the direction to trustees to pay over and divide in remainder, the actual intention has often been defeated. Hence, the courts have revolted from the injustice thus caused, and the homely instinct of righteousness has compelled the qualification that when the gift over is contained only in the direction to pay and divide at the end of an intermediate estate, the gift shall not be contingent if by the utmost effort and cunning a contrary intention can be detected in the will.

It has been said, though lately ignored, that where the postponement of the division is "for the convenience of the estate" the gift will be regarded as immediate. Clearly, within the meaning of the expression "for the convenience of the estate," if a life estate were carved out in advance of the remainder for the purpose of effectuating a testamentary intention with respect to the administration of the estate, the delay in the intended division would be "for the convenience of the estate." Late cases, however, have found the direction consistent only with a contingency in the gift even where there was an intermediate purpose to maintain the trust for the life of a person named.

If one could know what has been meant in this regard by the words "the convenience of the estate" the case at bar might be brought to rest.

Is is as significant of a vested estate as many other expressions in reported cases that in the fifth paragraph, quoted *supra*, the direction is not that the trustee shall pay and divide to and among persons indicated, but they are directed upon the expiration of the life interest to first divide into "five equal shares or portions." This is to be done before payment. The direction is not to divide into as many shares as there shall be survivors of decedent's children. Whether all shall survive or not, there must be five shares.

The common direction is that the distribution shall be made among persons named, indicated or classified. Its primary effect is that the fraction of division shall be determined by the number of possible beneficiaries who shall be found alive to participate in the division. There is then an element of uncertainty as to the number of the beneficiaries entitled to share, and, therefore, a like uncertainty as to the fractions to be ascertained, because the recipients must be first counted before the fractions can be known and the direction to divide can become effectual.

In this case the fractions are known from the time of the execution of the will, and the first duty, upon the failure of the intermediate term, is to divide and have ready for distribution the equal shares required. This excludes the possibility of a reduction in the number of shares to be paid, and makes it inconceivable that a contingent gift to a class or number of persons is indicated.

There is no gift over beyond the four children first named of any of the fifth shares in case of a death among them. The share apportioned to Caroline Dieffenbach, the fifth child, is not given to her, but is left in trust for her benefit during life, and in this trust is the only provision for the disposition of a share in case of the death of a child.

The absence of a gift over in the four instances is consistent only with a conviction on the part of the testatrix that she had

exhausted her testamentary intention with respect to the four shares and had left them where she meant them to stay. If these four gifts were contingent upon the survival of the beneficiaries for whom they were primarily intended, intestacy would result. A construction which would have this effect should be avoided.

As to the child fifthly named, the trust designed for her takes a form which enforces the argument that the gifts to the other children have no contingent quality. In this instance, the only one in which there is a disposition of a share to take effect upon the death of a child, the gift over is only in remainder and is clearly contingent. It is to the "remaining children" an expression of definite and often applied meaning. Its intention is that upon Caroline's death the share shall devolve only upon those of the decedent's children who shall be found alive.

The words "my remaining children," by their reflex effect upon the provision for the four children first named, make it clear that the shares of the first four were not to be paid to "remaining children," or, indeed, to any one except the beneficiaries named. In one case the testatrix saw a destination of a share beyond the life of one of her children. In each of the other four cases she was unconscious of any estate or interest in any person except the child for whom she destined it.

The sense of contingency is also excluded by the naming of the persons to take in remainder. (*Shangle v. Hallock*, 6 App. Div. 55, 58; *Carr v. Smith*, 25 id. 214, 216; *Matter of Pauley*, 28 Misc. Rep. 273; *Roosa v. Harrington*, 31 id. 529, 535.)

"In the absence of any clear expression or implication necessarily leading to that result, we should avoid a construction of the will which would disinherit this one grandchild." This is the expression in *Matter of Miller* (18 App. Div. 211; *affd.*, on opinion below, 155 N. Y. 664); and the opinion thus approved quotes as follows from *Scott v. Guernsey* (48 N. Y. 106, 121): "That meaning is to be preferred * * * which inclines to

the side of the inheritance of the children of a deceased child."

It results that the gifts to the four children were vested, and not contingent; that the other devise in trust for the fifth child vested in the trustees for her benefit, subject to the contingencies of the trust, and that the share, in remainder, of the daughter, Josephine, deceased, will pass to her representatives.

The infant daughter, as the next of kin of her mother, is admitted to the proceeding to be heard in behalf of her mother's estate and to criticise the account, but has no interest in the present adjudication.

The executor, who is the husband of the testatrix, has made substantial payments to some of his children, and upon the death of two of them has paid their funeral expenses. None of these payments can be allowed in this account. All of them, however, would seem to be proper offsets in favor of the executor who made them, or his estate, against the remaindermen, or their estates, respectively, but such offsets cannot be asserted in advance of the day when the remainders shall mature. The decree will proceed accordingly.

Decreed accordingly.

Matter of the Petition of JOHN S. VAN CLEEF to Render and Settle His Account as Sole Surviving Trustee of the Trusts Created under the Will of DANIEL A. ROBBINS, Deceased.

(*Surrogate's Court, Kings County, December, 1915.*)

WILLS—PROVISIONS OF—LEGACIES—WHEN ESTATE IN REMAINDER VESTED.

A will after general legacies made provision for each of the four children of testator in separate paragraphs of which one was as follows:

"*Sixth.* I give, devise and bequeath unto my daughter Mary Augusta for her sole and separate use, free from the control of any present or future husband, the net income of one other one-quarter of my estate for

and during the full end and term of her natural life, and upon her death I give, devise and bequeath the said one-quarter of my estate to the lawful issue of the said Mary Augusta, and in default of such lawful issue I give, devise and bequeath the same to the survivors and survivor of my children and the lawful issue of such of my children as shall be dead."

Held, that upon the death of Mary Augusta, who died after the testator, the estate in remainder vested in equal shares in the representative of her son who died in her lifetime, his child, his brother and the children of said brother.

PROCEEDING upon the account of a sole surviving trustee.

Cullen & Dykman, for accounting trustee.

D. A. Marsh and James M. Gray, for Marion Van Cleef
Warner and Sallie N. Gildersleeve.

Henry D. Lott, for Henry C. Van Cleef.

Samuel Evans Maires, for Caroline E. Dakin.

Patrick E. Callahan, special guardian for Lois Van Cleef,
Jean Van Cleef and Edna Van Cleef.

KETCHAM, S.—The will under which this accounting is made, after general legacies, makes provision for each of the four children of the testator, in four paragraphs, of which the one now requiring construction is an example. It is as follows:

"*Sixth*. I give, devise and bequeath unto my daughter Mary Augusta for her sole and separate use, free from the control of any present or future husband, the net income of one other one-quarter of my estate for and during the full end and term of her natural life, and upon her death I give, devise and bequeath the said one-quarter of my estate to the lawful issue of the said Mary Augusta, and in default of such lawful issue I give, devise and bequeath the same to the survivors and sur-

vivor of my children and the lawful issue of such of my children as shall be dead."

Mary Augusta died since the death of the testator, and the persons in whose behalf varying claims to the fund mentioned in the paragraph quoted are: the representative of Mary Augusta's son, Frank, who died in his mother's lifetime, his child, his brother Henry, and the three children of Henry.

The remainders limited to the lawful issue of Mary Augusta vested at the death of the testator in her two sons, subject to a change in the extent of their interest, but never as to the quality thereof, in case of birth of additional issue. Such right in the fund in question as Frank would have had, if living, has passed to his representative.

It remains to determine the persons who, with the executor of Frank's estate, are contemplated in the words "lawful issue," and to ascertain the proportions in which the fund shall be divided among them.

This phrase normally means all the descendants of the person whose issue is indicated. If it be used in this will in its ordinary signification, it will require distribution *per capita* of the fund equally among all the issue of whatever generation.

The words "lawful issue" may readily be detached from their primary meaning, but only by some glimpse of evidence tending to show that the testator used the words with an intention that they should not signify all his descendants. This adoption by the testator of a meaning which the words would not otherwise bear may appear in the will itself or, in a proper case, by extrinsic circumstances.

It is sought to show by such evidence that the words were intended to limit the remainder upon the death of the life beneficiary to her issue *per stirpes* and not *per capita*, in such manner that each stock of the life tenant, apparent upon her death, should take one-half of the fund.

In this effort it is argued that the words in question, occurring

twice in each of the four similar paragraphs of the will, should be taken to bear the same meaning, and if, in the last use of the words, they can conceivably be taken to intend a stirpital instead of a capital distribution, then the words in their earliest use should be infused with the same stirpital intent.

This is the law. (Matter of Farmers' Loan & Trust Co., 213 N. Y. 168.)

The whole argument then balances upon the claim that in this will a stirpital division is contemplated in the following words, with which the paragraph under construction closes: "Upon her death * * * and in default of such lawful issue, I give, devise and bequeath the same to the survivors and survivor of my children and the lawful issue of such of my children as shall be dead."

It has not been possible to extract this meaning. Whether in these closing words it is intended that the lawful issue of a deceased child of the testator is to be let into the division in place of the deceased person or is to have a distributive right independently and by virtue solely of his own primary nomination, no unusual meaning is impressed in either case upon the words "lawful issue."

Suppose the language adapted to the event of the death of one of the four children without issue had been, "I give to my remaining children, if then living, and in the case of the death of any one of them I give that which would have been his share to his lawful issue," the gift over to issue would have been of one-third, but there would be nothing to permit or suggest that "lawful issue" was to bear any other than its original meaning.

Suppose, again, the language had been, "I give to the persons who shall fulfill the following description: any child or children of mine and lawful issue of any deceased child or children of mine," then each person to be included in the description "lawful issue" would have a share equal to the share of a remaining child of the testator, but there would still be no inti-

mation that the testator meant to depart from established definitions.

Moreover, the search throughout the will for expressions which will define or extend the sense in which the words "lawful issue" were first used is not to be confined to a comparison or contrast between the first and the last employment of these words in each of these paragraphs.

What is the intent of the same words when used in the second instance in the paragraph?

After a gift over to the issue, it is provided that "in default of such lawful issue" the final gift over shall be to "surviving children and their lawful issue." Was it conceivably within the purpose of the testator that the words "in default of lawful issue" made it possible that if one of his children died leaving no living children but leaving children of a deceased child of his own, the trust fund would pass wholly to persons other than his grandchildren?

No one will question that children of a child of the testator were defined and included as lawful issue in the language "in default of such lawful issue." The phrase requires the exclusion of every descendant of the life beneficiary before a default of issue can be established.

Further, the final gift over contained in each of these paragraphs is limited not only upon default of issue, but "of such lawful issue." This, in the reflex value of the word "such," means the absence of any and all persons such as are contemplated in the first employment of the words "lawful issue," and makes it fairly manifest that "such" persons as are within the phrase when employed in one instance are "such" or the same as are intended in the other.

It results that if in the first and last appearance of the like expression there could be need for conjecture, both must take color and character from the intermediate phrase, as to which no doubt can be entertained.

It is said that the will reveals a solicitude on the part of the testator for his four children, and that this must be presumed to have reached beyond the life estates provided for them to the disposition of the remainders now under examination. If this preferential regard were conceded, it would aid in the construction of words of doubtful meaning, but it could not alone impose a special significance upon a standard phrase. Whatever might have been the attitude of the testator toward his children, words which, unqualified, would bear a fixed intent would have to retain their natural purpose in the absence of some verbal qualification to be found in the instrument.

Since this was written counsel for Marion Van Cleef Warner and Sallie N. Gildersleeve brings to the attention of the surrogate, as a strong authority in favor of the position of his clients, *Matter of Union Trust Co.* (N. Y. L. J., Dec. 15, 1915), decided by the Appellate Division of the First Department since the submission of this case.

It would be the duty of this court to follow the decision cited in a like case, but never unless the likeness was precise. The question here involved is parallel with that disposed of in the case cited, with one controlling exception.

The language there considered was: "I give, devise and bequeath the same in equal proportions to her issue, if any then surviving," and the conclusion there reached rested solely upon the conviction that in the words "in equal proportions" which qualified the gift, with some support in the context of the will and the circumstances surrounding the testator, there was an abiding purpose to secure an equality among the beneficiaries of the will, and that this purpose, in the judgment of the majority of the court, could not be satisfied except by the construction that equality among the stocks of the issue, and not among the individuals of such stocks, was intended.

There are no such words found in the will at bar, and it may be confidently said that, if they had been lacking in the instru-

ment before the court in the case cited, the prevailing opinion therein could not have been written.

It results that the remainder which falls in upon the death of the beneficiary, Mary Augusta, vests in equal shares, one in the representative of Frank, deceased; one in the living son, Henry; one in the child of Frank, and one in each of the three children of Henry. The decree may proceed accordingly.

Decreed accordingly.

Matter of the Petition of BROOKLYN TRUST COMPANY, to
Render and Settle Its Account as Executor of the Last Will
and Testament of MATILDA E. WEBB, Deceased.

(Surrogate's Court, Kings County, December, 1915.)

**DECEDENT ESTATE LAW, § 17—PROVISIONS OF—WHEN DECREASES TAKEN INTO
CONSIDERATION—VALUATION APPRAISED BY USE OF LIFE TABLES.**

In the application of section 17 of the Decedent Estate Law which provides "No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more," the rule of calculation adopted in Matter of Johnston (76 Misc. Rep. 391), to wit: "Ascertain the money value of the estate as it remained at death, subtract therefrom the amount of decedent's debts, pay one-half of the remainder to the corporate legatees, whose legacies were subject to reduction," must be followed.

Where by reason of delay in the disposition of the estate there have been decreases as well as appreciations in the value of its property, and there have been accruals of interest or income, the decreases must be taken into consideration in ascertaining the value of the estate as of the time of the death of the testatrix.

Where in the application of section 17 of the Decedent Estate Law it becomes necessary to include in the valuation of the estate the value of vested remainders, they must be appraised by the use of the life tables.

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PROCEEDING upon the account of an executor.

Cullen & Dykman, for executor.

Rufus T. Griggs, for objectants, William F. Webb and Lillian M. Etheridge.

Theodore L. Frothingham, for Brooklyn Hospital.

Percy S. Dudley, for Long Island College Hospital.

R. F. Greacen, for Brooklyn Home for Aged Men.

Lewis C. Grover, for Brooklyn Orphan Asylum.

Wood, Cooke & Seitz, for Brooklyn Children's Aid Society.

Henry Joralemon Davenport, for Brooklyn Home for Consumptives.

David Provost, for House of St. Giles the Cripple.

Hubbard & Rushmore, for Home for Friendless Women and Children.

KETCHAM, S.— This accounting requires the application of section 17 of the Decedent Estate Law, which provides:

“ No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more.”

It thus becomes necessary to compute the fund of which one-half is to be paid to the institutions which fall within the inhibition of the statute.

(1) There is then presented the inquiry, Is such fund to be ascertained by subtracting from the value of the estate left at the death of the testator only his debts, or by subtracting also the expenses of administration?

The whole question was answered when it was held that the estate which was subject to the subtraction of the debts paid was the estate to be taken at its value when the testator died. (*Matter of Durand*, 194 N. Y. 477, 488; *St. John v. Andrews Institute*, 191 id. 254, 274; *Hollis v. Drew Theological Seminary*, 95 id. 166, 177, 178; *Chamberlain v. Chamberlain*, 3 Lans. 348, 358; *Frost v. Emmanuel*, 152 App. Div. 687, 689; *Rich v. Tiffany*, 2 id. 25, 28; *Harris v. American Bible Society*, 4 Abb. (N. S.) 421, 428; *Orphan Asylum Society v. White*, 6 Dem. 201, 210.)

It would impute absurdity to this interpretation of the statute to suppose that in the words "value at the time of death," or their equivalent, there was defined anything except the monetary measure at the time of death of the property of which the decedent died seized or possessed. While the cases cited contain nothing of authority or tolerance for a contrary view, they were followed and re-enforced by express decisions which state the following formula, already adopted by this court: "Ascertain the money value of the estate as it remained at death, subtract therefrom the amount of decedent's debts, pay one-half of the remainder to the corporate legatees, whose legacies were subject to reduction." (*Matter of Johnston*, 76 Misc. Rep. 391.)

In *Matter of Teed* (59 Hun, 63, s. c. 76 id. 567) it is fairly apparent that, under this statute, the calculation of the share of certain religious and educational institutions was based upon the value of the estate at death, less both debts and testamentary expenses; and the case in both of its appeals is an authority

against the present views of this court, although its influence is impaired by the fact that the point was not argued.

In *Hollis v. Drew Theological Seminary* (95 N. Y. 166) the question was not involved, but the statement was clearly made that the value of the estate was to be ascertained as of the time of death, which necessarily excluded any conclusion or suggestion that the value of the estate was to be that which it should bear after it was depleted by expenses, and, further, that the value at the time of the testator's death was then to be taken after "paying his or her debts," in order to arrive at the sum from which the institutions should receive their statutory share.

In *Orphan Asylum Society v. White* (6 Dem. 201) Mr. Surrogate SIGNOR derives the rule from *Hollis v. Drew Theological Seminary* (*supra*), and in the calculation, spread in his opinion at page 210 of the report, holds that the only deduction to be made from the value of the estate as it stood at death is the amount of the debts.

In *Chamberlain v. Chamberlain* (3 Lans. 348) the court states the rule as this court has declared it and, at pages 358 and 359, closes its reasoning with the words: "The deductions authorized are limited to that portion of the estate that may be required to pay the testator's debts, and, by implication, exclude everything beyond that, in determining the amount he (the testator) may devise to the corporations, societies and associations mentioned. So far as the testator attempted to exceed the restriction imposed by the statute, his will was invalid, within the express terms made use of. It was valid to the extent of the half of his estate he was permitted by its language to devise and bequeath; but not beyond that."

The court then, after ascertaining the amount of the estate, proceeds: "And, as thus reduced, one-fourth of the estate of the testator left after the payment of his debts would be all that could be claimed by either of the legatees for which those legacies were provided."

In the same case on appeal (43 N. Y. 424) no real discussion is found, but the following language is used, with respect to legacies for charitable and educational institutions: "If the two legacies, when ascertained, shall in the aggregate exceed in amount the one-half part of the estate after the payment of just debts, they must be reduced by proper deductions."

In *Curran v. Fanning* (13 Hun, 458) the case of *Chamberlain v. Chamberlain* (*supra*) is regarded not only as authority that the half is to be computed with reference to the estate at the time of the testator's death, but that the debts are to be first deducted. See page 473 of the report.

In *Matter of Hughes* (Surr. Dees. N. Y. Co. [1891]) the computation rendered necessary by the statute in question proceeded upon the deduction of debts and without any subtraction of administrative expenses, though the latter item was substantial.

In *Hughes v. Stoutenburgh* (168 App. Div. 512) the will which was before the court was that which was involved in *Matter of Hughes* (*supra*). The opinion of the Appellate Division recites all of the figures which were involved in the decree in *Matter of Hughes*, which demonstrate that the decree therein was not based upon any subtraction from the value of the estate except debts, and says of the result reached by this calculation that it was in accordance with the rule prescribed in *Hollis v. Drew Theological Seminary* (*supra*).

In *Estate of Colburn* (N. Y. L. J., Dec. 18, 1915) Mr. Surrogate CONALAN, in determining the amount reserved by this statute to legatees who were educational institutions, says: "The amount which the above-named corporations may take is to be ascertained by computing the value of the estate, including the New Jersey real estate, as of the date of death of testator, subtracting therefrom the decedent's debts, and dividing the remainder by two. Administration expenses do not enter into

the calculation and are not to be subtracted like the debts of the decedent."

The state of authority thus portrayed requires that in the decree to be entered herein the rule of calculation adopted in the Matter of Johnston (*supra*), must prevail.

(2) By reason of delay in the disposition of the estate, there have been decreases, as well as appreciations, in the value of its property, and there have been accruals of interest or income. The decreases in the estate must be taken into consideration in ascertaining the value as of the time of death.

When the amount is reached which is to be apportioned to the corporations named as legatees in the residuary clause and the individuals named therein as such legatees, the corporate beneficiaries must receive one-half of all additions, either to the principal of the estate or to the interest or income thereof. After this adjustment, the balance of such additions must be added to the share allotted to the individual legatees under the residuary clause, and this share must bear the administration expenses. Any other disposition would defeat the statute.

(3) The remaining question is remarkable, not only in its essence and consequences, but in the dearth of relevant authority. The will provides as follows:

"*Sixth.* I give and bequeath to my Trustee hereinafter named the sum of Five thousand Dollars, in trust, to invest the same and apply the income arising therefrom to my sister, Emma Louise Mallon, until she arrives at the age of sixty-five years, at which time I direct my Trustee to pay the principal of said trust fund to her, if she be living, and if she be dead, then I direct that the principal of the trust fund shall form a part of my residuary estate.

"*Seventh.* I give and bequeath to my trustee hereinafter named the sum of Forty-five thousand Dollars, in trust, to invest the same and apply the income arising therefrom to my son, William F. Webb, until he arrives at the age of sixty-five years,

at which time the principal of said trust fund may be paid to him by my said trustee, if in its opinion it deems it expedient so to do, but if it does not deem it expedient so to do, it shall continue to pay to him the income therefrom until such time as in its discretion it deems it wise to pay him the principal of said trust fund. If my son, William F. Webb, dies before attaining the age of sixty-five years, or if the principal of the said trust fund shall not have been paid to him as above provided, I direct upon his death that my Trustee continue to hold the sum of Ten thousand Dollars, in trust, and to invest and reinvest the same, and to apply the income therefrom to my granddaughter Marie Webb, the daughter of my said son, until she attains the age of sixty-five years, at which time the principal of said trust fund shall be paid to her, if, in the discretion of the trustee it shall deem it wise to do so; if not, it shall continue to pay to her the income from such trust fund as long as she shall live. On the death of my granddaughter, if the principal of the trust fund shall not have been paid to her, as above provided, I direct that the principal of the trust fund shall be distributed equally among the following named charitable institutions: the Long Island College Hospital; the Brooklyn Home for the Aged Men; the Graham Home for Old Ladies; the Brooklyn Orphan Asylum; The Brooklyn Children's Aid Society; the Brooklyn Society for the Prevention of Cruelty to Children; the Brooklyn Home for Consumptives; the Brooklyn Hospital; St. Giles' Home for Crippled Children; the Home for Friendless Women and Children on Concord Street, Brooklyn, New York; the difference between the original amount of the trust fund for the benefit of my son William F. Webb and the trust then established herein for the benefit of my granddaughter, namely, Thirty-five thousand dollars, shall be distributed equally on the death of my said son, William F. Webb, among the charitable institutions above mentioned, provided always that my said son shall not have attained the age of sixty-five years,

or if the principal of the said trust fund shall not have been paid to him by my Trustee, as above provided.

" Eighth. I give to my Trustee the sum of Forty-five thousand Dollars, in trust, to invest and reinvest the same, and to apply the income therefrom to my daughter, Lillian M. Etheridge, until she arrives at the age of sixty-five years, at which time the principal of said trust fund may be paid to her by my said Trustee, if in its discretion it deems it expedient so to do, but if it does not deem it expedient so to do, it shall continue to pay to her the income therefrom until such time as in its discretion it deems it wise to pay her the principal of the said trust fund. If my daughter, Lillian M. Etheridge, dies before attaining the age of sixty-five years, or if the principal of the said trust fund shall not have been paid to her as above provided, I direct that upon her death the income therefrom to be paid to my grandson, Charles W. Etheridge, the son of my said daughter, Lillian M. Etheridge, during his natural life, and after his death, I direct that the principal of the trust fund shall be distributed equally among the charitable institutions mentioned in the Seventh Paragraph of this my Will.

" Ninth. All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath to the charitable institutions mentioned in the Seventh paragraph of my Will. If it shall appear at my death that I have bequeathed to the charitable institutions above named more than one-half of my estate, after the payment of my debts, I give, devise and bequeath the excess thereof to my children, or to the issue of any of them who may have died before me leaving issue him or her surviving."

Where in the application of section 17 of the Decedent Estate Law it becomes necessary to include in the valuation of the estate the value of remainders, they, if vested, must be appraised by the use of the life tables.

In the present case, the remainder limited to the residuary

legatees under the sixth paragraph is plainly within this rule, and its value at the testator's death must be regarded in the statutory calculation.

Under the two trusts of \$45,000, the remainders are hopelessly contingent, and there is no basis for their valuation. If the estate, exclusive of these funds, should now be divided according to statute, then in the happening of one or more of the contingencies upon which the destination of the funds depends, either the institutions, or a child of the testatrix, would receive \$45,000, and perhaps \$90,000, more than had been allotted in the first division.

Cases have arisen in which there was no possible basis for ascertaining the value at the death of the testator of contingent remainders, and it has been held therein that there could be no computation under the statute until the happening of the contingencies (*Rich v. Tiffany*, 2 App. Div. 25; *Hasbrouck v. Knoblauch*, 59 Misc. Rep. 99); but in these cases the only estate which was the subject of apportionment to the institutions was the contingent remainder. The law was, therefore, satisfied by waiting until the remainders should mature.

In *Hughes v. Stoutenburgh* (168 App. Div. 512) the inequality which the court must avoid in the case at bar was not only illustrated, but actually put into inequitable operation. There, in the original decree, the sum to be apportioned to the charities was \$28,126.38. This took no account of trusts under which there was secured to the same corporations certain contingent remainders, and it is apparent, at page 523 of the report, that these contingencies had occurred without adding to the amount of the bequests otherwise made to charitable uses, and that the charities had actually received a sum substantially less than the amount which the statute assured them. The result thus brought about would have been avoided, and a just solution would have been secured, if the original decree had impounded enough of the general estate to have secured ultimate equilibrium

between the institutions and the other persons concerned in opposition to their interests.

The case last cited is the only one disclosed by counsel or discovered by the court in which the facts were such that the statute might well have been defeated if the general estate had been paid away before the extinction or maturity of the conjectural remainder. Except for the warning to be derived from the mischance which happened in that case we are without known authority.

There can be but one way to fulfill the statute. The executor must retain from the estate, not devised in trust, the sum of \$90,000, and must so apply the several halves thereof that as the remainders under each of these \$45,000 trusts fall in an equality may be established between the institutions and the individuals concerned in the division of the whole estate.

These views may be embodied in the decree.

Decreed accordingly.

Matter of the Petition of FREDERICK F. FITTER, CHRISTOPHER FITTER, JR., and HENRY KROGMANN, as Sole Acting Executors and Trustees under the Last Will and Testament of JOHN H. KROGMANN, Deceased, to Render and Settle Their Account as Such Executors and Trustees.

(Surrogate's Court, Kings County, December, 1915.)

WILLS—DEVISE IN TRUST—DOWER—LIFE ESTATES—DUTIES OF EXECUTORS AND ADMINISTRATORS.

Where lands are devised in trust, the dower of testator's widow is preserved unless there is an obvious incompatibility between the actual assignment of dower and the complete operation of the trust. In such case the trust is not repugnant to the assertion of dower unless it is apparent that the trust requires the possession and control by the trustee of the entire lands.

The 2nd paragraph of testator's will, after the devise of a life estate in certain premises to his wife and a gift in trust of a certain sum of

money for her benefit during her life, provided that after her death said premises and the trust fund should be given to testator's children equally. The 3rd paragraph of the will provided "All the rest, residue and remainder of my estate, of whatever kind and nature and wherever situated, I do direct my Executors to divide into as many equal parts or shares as I may have children at the time of my death, and I give, devise and bequeath one of such equal parts or shares to each of my children, the children of any deceased child to take the share to which their parent would have been entitled if living; provided, however, that the shares of my daughter or daughters shall be held separately in trust for them by my Executors and invested and kept invested, and the net income derived therefrom paid over to them during their natural lives; and on their death the principal of their shares I direct to be divided among their children; and provided further that inasmuch as my son Clarence Krogmann has received seven hundred dollars more than my other children, I direct that that amount be deducted from any share to which he would otherwise be entitled."

Held, that the operation of the trust and the assertion of dower might coincide without offense to any purpose which testator discloses, and objections to payments made to the widow from the income from lands which were the subject of the trust will be overruled.

It is the duty of the executors to avail themselves of the privilege of the renewal of a lease of which the decedent died possessed not only as an incident to the exercise of the power given to them to continue testator's business in the leased premises but generally as a prudent means of retaining the interest of the estate in the building erected upon the leased premises.

PROCEEDING upon the account of executors and trustees.

Otto F. Struse, for executors.

James M. Gray, special guardian.

KETCHAM, S.—The will under which the accountants were appointed, in its second paragraph, contains a devise of a certain house and premises to the wife for life, and a gift in trust of \$8,000, to be invested and held for the benefit of the wife during her life. It is then provided that after the death of the wife the premises and the principal of the said sum of \$8,000 are given to the testator's children equally.

The third paragraph is as follows: "All the rest, residue and remainder of my estate, of whatever kind and nature and wherever situated, I do direct my Executors to divide into as many equal parts or shares as I may have children at the time of my death, and I give, devise and bequeath one of such equal parts or shares to each of my children, the children of any deceased child to take the share to which their parent would have been entitled if living; provided, however, that the shares of my daughter or daughters shall be held separately in trust for them by my Executors and invested and kept invested, and the net income derived therefrom paid over to them during their natural lives; and on their death the principal of their shares I direct to be divided among their children; and provided further that inasmuch as my son Clarence Krogmann has received seven hundred dollars more than my other children, I direct that that amount be deducted from any share to which he would otherwise be entitled."

The will appoints executors, and then provides as follows: "And I hereby authorize and empower (the executors) to sell and dispose of the whole or any part of my real estate, if, in their judgment, it shall appear to be for the best interests of my estate to do so, and to make, execute and deliver good and sufficient deeds of conveyance to the purchaser or purchasers thereof."

The testator died seized of several parcels of land besides the premises mentioned in the second paragraph of his will.

It becomes necessary to determine whether the testator intended that his widow should have the benefit of the provisions in her favor contained in the will, in addition to her dower.

Where, in the absence of an express provision in the will, this question is provoked by a devise of lands in trust, the rule is that the dower is preserved unless there is an obvious incompatibility between the actual assignment of dower and the complete operation of the trust. It is held that the trust is not

repugnant to the assertion of dower, unless it is apparent that the trust requires the possession and control by the trustee of the entire lands involved; and the courts have generally looked to see whether, among the trust provisions, there was a direction that the trustees should perform specific duties with respect to the lands, which by their nature would require entry upon the premises and the complete and exclusive management thereof. Thus, the duty to make repairs and improvements, to insure buildings, to mortgage and to lease, or otherwise deal with the premises in a manner which would be impossible if there were an assignment of dower by metes and bounds, has been held to be controlling evidence of an intention to exclude the widow from any right or relation to the lands. (Matter of Gordon, 172 N. Y. 25; Matter of Zahrt, 94 id. 605; Tobias v. Ketchum, 32 id. 319; Matter of Gale, 83 Misc. Rep. 686, and cases cited.)

In the case at bar no such indication appears. Here, nothing of the devise in trust will fail of effect if the right of dower be recognized and assigned. The operation of the trust and the assertion of dower may coincide without offense to any purpose which the testator discloses.

In this view, the accountants have proceeded properly in their payments to the widow from the income of the lands which were the subject of the trust, and the objection in that behalf is overruled.

The objection to the renewal of the lease of which the decedent died possessed is overruled. It was within the duty of the executors to avail themselves of the privilege of renewal, not only as an incident to the exercise of the power given them to continue the testator's business in the premises which he held under the lease, but generally as a prudent means of retaining the interest of the estate in the buildings erected upon the leased premises. The decree should conform to these views.

Decreed accordingly.

LORILLARD SPENCER, 3D, and WOLCOTT G. LANE, as Trustees under the Will of LORILLARD SPENCER, 2D, Deceased, Respondents, v. CAROLINE S. SPENCER, Appellant, Impleaded with MARY R. SPENCER and LORILLARD SPENCER, 3D, Defendants, and LORILLARD SPENCER, 4TH, Respondent.

(*Supreme Court, App. Div., First Department, July 9, 1915.*)

WILL CONSTRUED—REQUEST OF NET INCOME OF RESIDUARY ESTATE FOR LIFE*—COST OF CARRYING UNPRODUCTIVE REALTY—WHEN EXPENSE CHARGEABLE AGAINST INCOME.

Where a testator placed his residuary estate consisting of real and personal property in trust, the net income therefrom to be paid to his widow for life, the cost to the trustees of carrying unproductive real property which is part of the residuary estate should be paid out of the income of said estate rather than out of the principal, and the life tenant is not entitled to receive the income free of such deduction, there being nothing in the will itself showing an intention to impose said carrying charges upon the principal of the estate.

INGRAHAM, P. J., and LAUGHLIN, J., dissented, with opinion.

APPEAL by the defendant, Caroline S. Spencer, from a judgment of the Supreme Court in favor of the plaintiff and one of the defendants, entered in the office of the clerk of the county of New York on the 3d day of February, 1915, upon the decision of the court after a trial at the New York Special Term.

An appeal is also taken from an order entered in said clerk's office on the 11th day of November, 1914, denying the appellant's motion for an order permitting her to amend her answer *nunc pro tunc*, and without prejudice.

The judgment settled the accounts of the plaintiffs as trustees.

Herbert Barry and J. Mayhew Wainwright, for the appellant.

* See note, Vol. XII, p. 546.

Wolcott G. Lane, for the plaintiffs, respondents.

Charles H. Edwards, for B. Aymar Sands, guardian ad litem of Lorillard Spencer, 4th, respondent.

DOWLING, J.—By the 6th clause of his will Lorillard Spencer, 2d, provided, among other things, as follows:

"*Sixth.* All the rest, residue and remainder of my estate of every nature and kind, whether real, personal or mixed, and wheresoever situated, which I have or may have, or of which I may die possessed, and whether in possession, reversion or remainder, so far as I have power to dispose of the same by will, I give, devise and bequeath to my said Trustees hereinafter named, their survivors or survivor, successors or successor, in trust, however, for the following purposes: To invest and re-invest the funds of said trust estate and to change the investments thereof according to their or his best skill and judgment in the way and manner hereinafter provided; to collect and receive the rents, dividends, interest and income thereof and to pay over to my said wife, Caroline S. Spencer, during her life, the net annual income in quarterly installments."

Among other property deceased left a one-third interest in a tract of land situated at Williamsbridge, borough of The Bronx, city of New York, which had come to him through inheritance and which had been in his family for many years. As to this one-third interest he directed by the 3d clause of his will that if the farm was not sold by the executors of his brother Charles before July 28, 1911, the proceeds of the testator's interest in said farm should be divided as follows: If he sold his entire interest in the farm previous to his death he bequeathed to his son, Lorillard Spencer, Jr., the sum of \$100,000; or, if he only sold a portion thereof before his death, then a sum equal to twenty-five per cent of the net proceeds of the sale. If, after the testator's death, the whole of his interest in the farm or

any part thereof was sold by his executors, then he gave and bequeathed to his son, Lorillard Spencer, Jr., a sum equal to twenty-five per cent of the net amount realized on the sale. If the son should die before him, or if, at the time of his death, the whole or any part of the farm should remain unsold, then he gave to his daughter-in-law, Mary R. Spencer, the same share in the proceeds of said property which his son would have received if living. No disposition was made of the remainder of his one-third interest in the said farm or the proceeds of sale thereof, or any interest therein over and above the amount so bequeathed to his son. The personal property turned over to the trustees amounted to \$156,802.50 in securities and cash, subsequently increased. The testator held other real estate as well as the Williamsbridge farm. The complaint set forth that all of the real estate owned by the testator was held by the trustees as part of the residuary estate and that allegation was admitted by the answer of the appellant, although she subsequently sought leave to amend the same. The Williamsbridge farm is unproductive, and the taxes thereon have been paid by the trustees out of the income of the residuary estate. The appellant claims that the taxes and carrying charges should not be paid out of the income of the estate, but that she should receive her share thereof without deduction. It is a settled rule that annual taxes and carrying charges must be borne by the person having a life interest in the property unless there is an unmistakable direction to the contrary in the instrument creating the various estates therein. (*Pinckney v. Pinckney*, 1 Bradf. 269; *Booth v. Ammerman*, 4 id. 129; *Matter of Albertson*, 113 N. Y. 434; *Woodward v. James*, 115 id. 346; *Chamberlin v. Gleason*, 163 id. 214; *Matter of Tracy*, 179 id. 501.) It is to be noted that the income which is to be paid over to the testator's widow is "the net annual income." There is nothing in this will from which can be spelled out any intention upon the part of the testator that the carrying charges

upon this property should be paid out of the principal of his estate or that it should not be deducted from the income. To insert such a provision in the testator's will would, it seems to me, be making a will for him and would not be construing the will which is actually made. I, therefore, think the judgment appealed from should be affirmed, with costs.

MCLAUGHLIN and HOTCHKISS, JJ., concurred; INGRAHAM, P. J., and LAUGHLIN, J., dissented.

INGRAHAM, P. J. (dissenting).—The question presented on this appeal is, when certain amounts paid by the trustees for taxes on an interest of the testator in certain unproductive real property should be paid from the income of the trust property. The testator had upwards of \$250,000 of personalty, several parcels of productive real estate located in the city of New York, a residence at Newport, R. I., and an undivided third interest in a tract of land at Williamsbridge. He had an income of from \$35,000 to \$45,000 a year, of which his property produced about \$20,000 per year, and \$20,000 per year was the income of certain property held in trust, to the income of which he was entitled for life, with remainder to his son. On April 27, 1911, he executed his will, and he died March 14, 1912, leaving him surviving his widow, the appellant, and one son, who was one of the trustees, his only heirs at law and next of kin. He had resided at Newport, R. I., for many years. By his will he left \$100,000 and all his household furniture, pictures, jewelry and other articles of personal property to his wife, except certain articles which he specifically bequeathed to his son, and, with the exception of some legacies to servants and the sum of \$25,000 in trust for his grandson and an annuity of \$200 a year, he gave, devised and bequeathed all the rest, residue and remainder of his estate "of every nature and kind, whether real, personal or mixed, and wheresoever situated," to trustees

to pay to his wife during her life "the net annual income in quarterly installments," and upon the death of his wife to pay such income to his son for life, with a remainder to the lawful issue of his son. He gave to his trustees a full power of sale or exchange of his real estate, and provided for the investment of the trust fund, "charging any and all premiums paid upon said bonds and securities to the capital of the trust, expressly directing that my said trustees, their survivors or survivor, successors or successor, shall apply the entire amount received for interest on such bonds as income to the benefit of the life beneficiary, and shall not retain any amount thereof for a sinking fund toward reimbursement to the principal of the premiums paid on the purchase of such bonds." The will further provided that the trustees may account to the satisfaction of the trustees and of the *cestuis que trustent*, but not remaindermen; that the provision for his wife should be in lieu and bar of dower, or in satisfaction of all claim to a distributive share of his estate.

A consideration of the careful provisions of this will must satisfy any one reading it that the first thought of the testator was to insure to his wife an income for her life. The interest on all the bonds was to be paid to her, and no amount was to be retained for a sinking fund, and all the net income of the residue of his estate was to be paid to his wife and, after her death, to his son. When the will was executed the testator owned an undivided third interest in the Williamsbridge farm. He treated this as distinct from his other property, evidently understanding that it would be disposed of before his death. The will recited that he had an agreement with his brother and sister to divide the farm if it was not sold before July 28, 1911, and then directed that "the proceeds of my said interest in, or share of, said farm shall be divided as follows." If he sold his entire interest in said farm before his death then his son was to have \$100,000. If he sold part of it, his son was to have twenty-five per cent of the net pro-

ceeds of such sale. If after his death the interest in the farm was sold by his trustees, then his son was to have twenty-five per cent of the amount realized from such sale or sales, with no provision as to what should be done with the remaining seventy-five per cent. The agreement with his brother and sister to divide the farm was not carried out during his life, nor was any of it sold either before or after the death of the testator, and it is evident that since his death conditions have existed that have made it impossible to sell at anything like its value; but it produces no income, and the taxes that have been imposed and the cost of carrying it have absorbed all the income of the estate, so that the wife has received but \$3,060.62 during a period of more than two years from the testator's death.

It would seem that the net income from the estate during this period has been about \$23,278.63. From this has been expended on the Newport property, which has been occupied by the widow, \$8,824.45, and for carrying charges and taxes on the Williamsbridge property \$9,877.79. The trustees paid this sum for taxes out of the income received from the balance of the trust. The widow claims that these taxes and charges should not be paid out of such income, and the court has sustained the contention of the trustees.

Did the testator intend that the charges for carrying the Williamsbridge property until it could be sold, as he evidently intended that it should, should be paid out of the income which he had provided for the support of his wife, so that she should be left without income for her support? I do not think he did. It is undoubtedly the rule that "interest on mortgages, taxes, repairs, and all those current expenses which are fairly incidental to the maintenance of the realty used by a life tenant, are payable by him;" and that rule should be "adhered to upon all occasions, unless, in so doing, we violate a plain direction to the contrary; which, if not found in the will in so many words, yet is the only one which a fair

and reasonable construction permits of our finding." (Matter of Albertson, 113 N. Y. 434.) But where the testator manifests the contrary intention it must govern. (Matter of Tracy, 179 N. Y. 501; Clarke v. Clarke, 145 id. 476.)

This property, however, does come within this rule, for it was evidently not the intention of the testator that it was to go to the trustees as part of the trust. Its disposition was specifically provided for by the 3d clause of the will. If all sold before his death, \$100,000, or one-fourth of the net proceeds of the part sold, if only a part was sold, was to be paid to his son. As to that portion of the proceeds which was to be paid to his son, it was not, and never would, be a part of the trust estate. The testator evidently understood that this Williamsbridge property would not produce any income; that if he did not sell it during his life his trustees would, and that the proceeds would be disposed of as he directed — that is, one-quarter to his son, and the remaining three-quarters to become part of the residuary estate. It was clearly not anticipated that the period before the sale of the property would be so long that the question as to how the taxes should be provided for would be serious, and so the property was left in a class by itself, the taxes and carrying charges to be paid from the proceeds of the sale when made. Considering the careful provisions in the will by which the whole income of his property should be assured to the testator's widow, and to his son after her death, without deduction for the so-called "sinking fund" or to make up any deficiency, and the separate disposition that he makes of the proceeds of this Williamsbridge property when sold, they seem to me to carry the conviction that it was not the intention that this farm until sold should be a part of the trust property, so that the cost of carrying it should be paid out of income of the property which was to be devoted to the support and maintenance of his wife; and I think it will best carry out the ex-

pressed intention of the testator by providing that these taxes shall be paid out of the principal of the estate.

The judgment should, therefore, be modified as hereinbefore indicated, with costs to all parties payable out of the estate.

LAUGHLIN, J., concurred.

Judgment and order affirmed, with costs.

In the Matter of the Accounting of EVA MAUD MARINE, as Executrix, etc., of MARY CRUIKSHANK, Deceased.

EVA MAUD MARINE, Individually and as Executrix, etc., Appellant; CHARLES H. SCHAMBACHER, Respondent.

(*Supreme Court, Appellate Division, Second Department, July 30, 1915.*)

DECEDENT'S ESTATE—GIFT OF CERTIFICATE OF DEPOSIT—INDORSEMENT AND DELIVERY FOR COLLECTION ONLY.

Where on the day prior to the death of a woman, a certificate of deposit, payable to her order and indorsed by her, was delivered by a person whom she had named as her executrix, without her own indorsement, to a savings bank which, after indorsing the same, delivered it to another bank for collection, and a few days thereafter the savings bank being advised by its transferrer, the collecting bank, that the certificate had been paid, opened an account in the name of the decedent in trust for the executrix, there was no executed gift of the certificate, since it appears that the certificate was indorsed and delivered solely for the purpose of having it collected.

APPEAL by Eva Maud Marine, individually and as executrix, from a decree of the Surrogate's Court of the county of Kings, entered in the office of said Surrogate's Court on or about the 1st day of October, 1914.

William Drennan, for the appellant.

George A. Larkin, for the respondent.

RICH, J.—The executrix of Mary Cruikshank, deceased, appeals to this court from a decree of the Surrogate's Court of Kings county, directing payment to Charles Schambacher, the respondent, of the sum of \$500 and interest under the provisions of the second subdivision of the will of said decedent, reading as follows: "*Second.* I give and bequeath to Charles H. Schambacher the sum of five hundred dollars payable exclusively out of any funds I may have on deposit in any bank in Friendship, New York." The appellant, in an involuntary accounting, filed her account showing a balance in the estate of \$3,841.65, to which the respondent filed objections in which he alleged that at the time of her death Mary Cruikshank had in a bank in Friendship, N. Y., \$1,019.50, of which no mention was made in said account, and that his legacy had not been paid. He accordingly asked for an order directing an amendment of the account by including therein said sum of \$1,019.50 as a charge against the executrix, and directing the payment of his legacy. The facts were stipulated, and no evidence outside of the stipulation given.

On May 16, 1910, the decedent deposited in the First National Bank of Friendship, located in the village of Friendship, the sum of \$1,000, taking from the bank a certificate of deposit payable to the order of herself on return of the certificate properly indorsed. The ownership and interest of the decedent in this deposit and certificate remained unchanged during her lifetime, unless, as the appellant contends, a change was effected by the following transactions:

On October seventh said certificate of deposit, indorsed by the decedent by mark, was delivered by the appellant to the Williamsburg Savings Bank of Brooklyn, who, after indorsing the same, delivered it to another bank for collection. On the following day, October eighth, the testatrix died. On October thirteenth following, the savings bank was advised by its indorsee, the collecting bank, that the certificate had been paid,

and thereupon it opened an account on its books in the name of "Mary Cruikshank in trust for Eva Maud Marine." It was contended that these facts establish an executed gift of the certificate, and deposit represented by it to the appellant, and that at the time of her death the testatrix had no money or funds on deposit in any bank in Friendship, and payment of the legacy being expressly limited to such fund which was disposed of by the testatrix prior to her death, the legacy addeemed.

The \$1,000 stood as a deposit and credit to the account of Mary Cruikshank on the books of the First National Bank of Friendship at the time of her death and thereafter, down to October tenth, when the certificate of deposit was paid and the account closed.

The surrogate found as facts that on October eighth, the day on which she died, the testatrix had on deposit in the Friendship bank the sum of \$1,000; that said certificate of deposit was indorsed and delivered to the appellant solely for the purpose of having the same collected; that the deceased never parted with the title thereto, and that the appellant in collecting the same acted as the agent of the decedent. He accordingly decreed that the appellant executrix had fully accounted for all money and property of the estate of her testatrix which had come into her hands as such executrix, and had fully complied with the terms and provisions of said will, except that she had failed and neglected to pay said legacy to Schambacher, which payment was ordered to be made out of the funds remaining in her hands as executrix.

I think the stipulated facts are susceptible of the conclusions drawn by the learned surrogate that the certificate was indorsed by the decedent to the savings bank, and received by the latter, with the mutual understanding that the instrument was put in its possession for the special purpose of collection and not for the purpose of transferring the same, within the rule de-

clared in *Bank of America v. Waydell* (187 N. Y. 115), although the bank indorsee in that case was the direct indorsee of a prior collecting agent, while in the case at bar the savings bank was the direct indorsee of the owner of the certificate. While the appellant delivered the instrument to the savings bank she had no property therein. The most that can be claimed by appellant is that the decedent intended to create a trust in her favor, to become operative only when the fund represented by the certificate should be paid and come into the possession of the savings bank, which did not occur during her lifetime.

The appellant relies upon authorities holding that for the purposes of a gift the mere delivery of an instrument for the payment of money is effectual, even though such instrument is transferable by indorsement and not indorsed. This rule has no application to the question as to whether the deceased had money on deposit in the bank at Friendship at the time of her death, and in addition the stipulated facts do not establish an intent to give the certificate by the decedent to the appellant. Such conclusion or presumption is repelled by the absence of proof of any delivery to the appellant with the intention on the part of the decedent to invest her with the present ownership of the certificate or fund represented by it. Although it is stipulated that such certificate was delivered by the appellant to the savings bank, there is no proof of any delivery to her except such as arises from the delivery to the bank. The certificate does not bear her indorsement, and it is clear that her possession was merely for the purpose of delivery to the bank for the purposes of collection, as the agent of the deceased and not as the owner. Whether the legacy is specific or demonstrative is immaterial; the testatrix at the time of her death was the owner of the uncollected and unpaid deposit in a bank in Friendship, N. Y., and the respondent's legacy is payable therefrom.

The decree of the Surrogate's Court of Kings county is affirmed, with costs.

JENKS, P. J., THOMAS and STAPLETON, JJ., concurred.

The parties hereto having stipulated in open court that this case may be disposed of by a court of four, the decision is as follows: Decree of the Surrogate's Court of Kings county affirmed, with costs.

JAMES STACK, Plaintiff, *v.* JACOB LEBERMAN, Defendant.

(*Supreme Court, Appellate Division, First Department, July 9, 1915.*)

WILL CONSTRUED—LIFE ESTATE WITH REMAINDER TO HEIRS OF LIFE TENANT—WHEN RELATIVE OF THE HALF BLOOD MAY TAKE—DECEDENT ESTATE LAW, SECTION 90, CONSTRUED.

Where a testatrix gave to her daughter the net income of her estate for life, remainder to the "heirs" of said daughter upon her death, and the only heir of the life tenant at the time of her decease was her half sister, a daughter of her father by his first wife, the half sister is entitled to the remainder, to the exclusion of the brothers and sisters of the testatrix and their descendants.

Such construction to the word "heirs" will be given as will prevent a partial intestacy.

Section 90 of the Decedent Estate Law, which provides that relatives of the half blood shall not inherit from an intestate, if they are not of the blood of the ancestor from whom the property descends, has no application to the will aforesaid, for the remainderman takes under the will itself and not directly by descent or distribution from the life tenant.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

Alonzo G. McLaughlin, for the plaintiff.

Walter E. Warner, for the defendant.

DOWLING, J.— Mary Gannon died on or about September 5, 1904, seized and possessed of certain real property then situate in the county of New York (now in the county of Bronx) known as No. 566 East One Hundred and Forty-ninth street, New York city, which had been conveyed to her by Patrick Gannon, her husband, by deed dated January 27, 1896, the consideration therefor being one dollar and other valuable considerations. She left a last will and testament dated August 18, 1903, duly admitted to probate by the Surrogate's Court, New York county, March 25, 1908, whereby after directing the payment of her debts and funeral expenses, she gave, devised and bequeathed all the rest, residue and remainder of her estate to her executors and trustees thereafter named or survivor in trust: "*First.* To give to my stepdaughter Katie Five Hundred Dollars. *Second.* To give to my sister Ellen Two Hundred Dollars. *Third.* To give to my beloved daughter Theresa during her life the net income of my estate and her receipt shall be a full acquittance. *Fourth.* To give and grant to the heirs of my beloved daughter Theresa upon her death the rest, residue and remainder of my estate." Letters testamentary were issued to the executors named in the will, both of whom have since died and no one has been appointed to act in their place and stead. Her daughter was Theresa Stack, who was her only heir and next of kin. Theresa Stack died intestate November 25, 1904, leaving no child or a descendant of any child, no parent, no brother or sister of the whole or half blood, nor any descendant thereof, save Catherine Gannon Holweg, her half sister, who was the daughter of Patrick Gannon by his first wife.

On or about November 30, 1904, the said Catherine Gannon Holweg sold and transferred to the plaintiff herein an undivided one-half interest in and to the said real property by an agreement duly recorded in the register's office of the county of New York. On February 5, 1915, the plaintiff and defendant herein

entered into a contract in writing for the purchase of the said undivided one-half interest in and to the said real property, which contract the defendant has refused to perform on the ground that plaintiff was not the owner of said undivided one-half interest because Catherine Gannon Holweg, the half sister of Theresa Stack, did not take any title whatever to the said real property under the provisions of paragraph 4 of the will of Mary Gannon, and was not the heir of Theresa Stack within the meaning of said will, but that, on the contrary, the said real property under the provisions of said paragraph 4 of the will passed to the brothers, sister, nephews and nieces of Mary Gannon. I believe that the defendant is in error in this construction of the law. The most reasonable construction to place upon the word "heirs" as used in the 4th paragraph of testatrix's will is that class of persons who would be entitled to inherit from Theresa Stack according to the laws of descent, if she died intestate. Any other construction would be a forced one which would result in holding that the testatrix had died intestate as to a portion of her estate, which is directly opposed to the clear intention of her will. "The law favors a construction which will prevent partial intestacy." (*Schult v. Moll*, 132 N. Y. 122.) "There is always a presumption that the testator did not contemplate intestacy, and a construction that will result in even partial intestacy is not to be adopted, if a different construction is permissible." (*Simpson v. Trust Co. of America*, 129 App. Div. 205.) The controlling authority upon this proposition is *Johnson v. Brasington* (156 N. Y. 181) where the court held: "The word 'heirs,' when used in a will or other instrument, is to be understood in its primary or legal sense, unless it appears from other parts of the instrument that it was used in the more restricted sense of children, heirs of the body, or lineal descendants. * * *

"When in construing a devise of a remainder in fee to the 'children or heirs' of the life tenant, being the testator's only

child, the meaning to be given to the word 'heirs' is doubtful, but the will discloses a clear intention to dispose of the whole estate, and if the word 'heirs' is construed in its restricted sense of lineal descendants, intestacy will result as to the remainder, whereas it will be avoided by construing the word in its primary or legal sense, the latter construction will prevail, even though it carries a share in the property to relatives of the life tenant on the mother's side to the exclusion of relatives of the testator's own blood."

Conceding that the heirs of Theresa Stack would take from the testatrix by purchase and not by descent or inheritance the defendant still claims that Catherine Gannon Holweg, being a half sister, cannot take any interest in the property in question because of the provisions of section 90 of the Decedent Estate Law (Consol. Laws, chap. 13; Laws of 1909, chap. 18), reading as follows:

"§ 90. Relatives of the half-blood. Relatives of the half-blood and their descendants shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance." (Re-enacting former Real Prop. Law [Gen. Laws, chap. 46; Laws of 1896, chap. 547], § 290.)

Defendant claims that, because the property in question was real estate which came to Mrs. Stack from her mother (Mrs. Gannon), Mrs. Holweg, not being of that mother's blood, cannot inherit. But in this contention the fact is overlooked that Mrs. Holweg does not claim by descent from Theresa Stack, but directly from Mary Gannon by virtue of the provisions and devises in the latter's will. The statute defining who are the heirs of Theresa Stack is only resorted to for the purpose of determining the class of persons answering that description, and not to confer the right by descent, under which Mrs. Hol-

weg claims nothing, but claims solely through the will. As we said in *Farmers' Loan & Trust Co. v. Polk* (166 App. Div. 43): "I am of opinion, however, that those provisions of the statute [referring to section 90 of the Decedent Estate Law] have no bearing on the question presented for decision, because the remainder was never vested in James K. Polk, and was not inherited from him as intestate property, but came from the settlor of the trust, who conveyed it directly to the 'lawful kindred' of his nephew, James K. Polk. In determining who answer the description of 'kindred' and 'lawful kindred' of James K. Polk, we look to our statutes in the light of the facts, to see who would be the kindred of James K. Polk; or, in other words, to see who of his kindred would have been his next of kin and entitled to take his personalty on distribution, and his heirs at law and entitled to inherit his realty, for it is fairly to be inferred that they are the respective classes designated by the settlor as 'kindred' and 'lawful kindred.' (See *Lawton v. Corlies*, 127 N. Y. 101; *Woodward v. James*, 115 id. 346; *Griswold v. Sawyer*, 125 id. 411; *Keteltas v. Keteltas*, 72 id. 312.) But we do not consider the statute on the erroneous assumption that the realty is to be inherited by the remainderman from the life tenant, and that it came to him from an ancestor, which would require us to consider whether the statute by which all not of the blood of the ancestors are excluded from inheriting is applicable. If the settlor intended to confine the remainder of the realty to those who would have taken if he had given or devised it to James K. Polk, or if it had come to the latter by descent from him, some indication of such intention might reasonably be expected to be found in the deed of trust, but there is none. The words used in the deed of trust only indicate an intention that if James K. Polk saw fit not to exercise the power of appointment, the remainder would go to whoever would have taken it if it were owned by the life tenant, without regard to how or from whom he acquired it." So, in the case at bar, Mary Gannon fixed and

determined the right to the remainder of her estate by giving it to such person or persons as would answer the description of the heirs of her daughter Theresa, upon the latter's death, and to that description the Statute of Descent determines that Mrs. Holweg alone answers.

It follows, therefore, that the question submitted to the court: "Is Catherine Gannon Holweg, the half sister of Theresa Stack, her heir within the meaning of the fourth paragraph of the will of Mary Gannon?" must be answered in the affirmative, and judgment directed in favor of the plaintiff against the defendant, directing the latter to perform his agreement to purchase the undivided one-half interest of Mrs. Holweg in and to the property in question, heretofore transferred to the plaintiff.

INGRAHAM, P. J., CLARKE, SCOTT and HOTCHKISS, JJ., concurred.

Judgment directed as stated in opinion. Order to be settled on notice.

GEORGE F. BUTTERWORTH and HENRY J. STORRS, as Executors of and Trustees under the Last Will and Testament of CORNELIA STORRS, Deceased, Respondents, *v.* CHARLES E. KEELER and Others, Defendants, Impleaded with WILLIAM H. KEELER and Others, Appellants, and the ATTORNEY-GENERAL OF THE STATE OF NEW YORK, Respondent.

(Supreme Court, Appellate Division, First Department, July 9, 1915.)

TRUST—CHARITABLE GIFT FOR BENEFIT OF PUBLIC—VALIDITY UNDER SECTION 12 OF PERSONAL PROPERTY LAW.

A gift by a decedent of one-half of her residuary estate to her executors, "in trust, nevertheless, to be used and devoted by them to the establishment of a school for girls in the town of North Salem," is valid as a charitable gift for the benefit of the public under section 12 of the Personal Property Law, where it appears that the decedent, a woman of charitable impulses, and leaving no children or descendants, had long been a resident of said town, which was inhabited by people of small means and in which the facilities for public education were meagre.

APPEAL by the defendants, William H. Keeler and others, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 20th day of January, 1915, upon the decision of a referee appointed to hear and determine.

Culver & Whittlesey, Samuel A. Davis, Clayton Ryder, Reuben L. Haskell and Horatio C. King (Chesleigh H. Briscoe of counsel), for the appellants.

Henry W. Taft (Francis Smyth and Thomas B. Gilchrist of counsel), for the plaintiffs, respondents.

Egburt E. Woodbury, Attorney-General (Robert P. Beyer, Deputy Attorney-General, of counsel), respondent in person.

Judgment affirmed, with costs, on the opinion of the referee.

Present — INGRAHAM, P. J., CLARKE, SCOTT, DOWLING and HOTCHKISS, JJ.

The following is the opinion of the referee:

EDWARD E. SPRAGUE, Referee.— The decedent by her will gave one-half of her residuary estate to her executors, “in trust, nevertheless, to be used and devoted by them to the establishment of a school for girls in the town of North Salem.” The amount of this gift appears to be approximately \$75,000. The only serious question in the case is concerned with the validity of this gift.

The gift is undoubtedly invalid unless governed by section 12 of the Personal Property Law,* which provides that “no gift, grant, or bequest to religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this State, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same.” The inquiry here must be whether this is a gift to “religious, educational, charitable, or benevolent uses.”

The language of the statute above cited has been considered by the Court of Appeals in five distinct cases within the past six years. (*Matter of Shattuck*, 193 N. Y. 446; *Manley v. Fiske*, 139 App. Div. 665; *affd. without opinion*, 201 N. Y. 546; *Matter of Robinson*, 203 id. 380; *Starr v. Selleck*, 145 App. Div. 869; *affd. without opinion*, 205 N. Y. 545; *Matter of Cunningham*, 206 id. 601.) In all these cases, except *Matter of Shattuck*, the testamentary disposition was held valid.

In the *Shattuck* case the gift was to the executor, “in trust,

* Consol. Laws, chap. 41 (Laws of 1909, chap. 45), § 12, subd. 1.—[REp.]

however, the rents, profits and income thereof to be expended by him annually and to be paid over to religious, educational or eleemosynary institutions as in his judgment shall seem advisable." The court construing chapter 701 of the Laws of 1893 (now section 12 of the Personal Property Law) held that the intention of the Legislature in passing the act of 1893 was to save to the public, charitable gifts made in trust to uncertain and indefinite beneficiaries; that gifts for the benefit of private institutions or individuals were not intended to be included within its provisions; that to constitute a charity the use must be public in its nature; that an educational institution is not necessarily a public or charitable institution; and that under the will of the testatrix the trustee could lawfully make a disposition of the proceeds of the trust fund which would be in whole or in part private and individual and not public and charitable. For these reasons the gift in the Shattuck case was held invalid.

Applying this line of reasoning to the present case, it appears at once that these trustees have no discretion in selecting the object of the testatrix's bounty. The bequest is "to be used and devoted by them to the establishment of a school for girls in the town of North Salem." The sole question here is whether this is a charitable gift for the benefit of the public.

Mrs. Storrs, the testatrix, was a woman somewhat advanced in years, a widow having no children or descendants. She had been long a resident of North Salem, owning several pieces of real estate in the town. Her neighbors were mainly persons of narrow means, belonging to the wage-earning class. The facilities for public education were meagre. Mrs. Storrs was a woman of charitable impulses. In the fifth clause of her will she provides for a small contribution towards the building of a Roman Catholic church, and she gives one-half of her residuary estate to the New York Skin and Cancer Hospital. I see no escape from the conclusion that this proposed school for girls

was intended as a charity. The words of Judge CHASE in *Matter of Robinson* (203 N. Y. 380, 388) are peculiarly appropriate. "It is doubtless true that the paragraph of the will by which the trust is attempted to be created is susceptible of more than one construction, but a construction which is fairly within the rules of law and that sustains the trust and devotes the fund included therein to purposes permitted by law and to the good of humanity should be preferred."

Counsel for defendants contend that it would be competent for the trustees under Mrs. Storrs' will to conduct a private school for profit. But she makes no disposition of any such possible profit. It is argued by one of the counsel that the trustees might lawfully apply the profit to their own use. But it is hardly conceivable that Mrs. Storrs should have desired or expected that a New York lawyer and a business man residing in New Jersey and doing business in New York should establish a girls' school in a small town in Westchester county for their own personal profit, and it is quite clear that the profit would not belong to them, if they made any. As I read the will, the only rational construction is that this was a charitable gift. If so, then it was a gift for public charity, the beneficiaries being the girls of the town of North Salem.

It is further objected that the will is not sufficiently definite in prescribing the kind of school to be established, whether elementary or advanced, general, special or technical, sectarian or non-sectarian. But these are details which the testatrix intrusted to the discretion of her trustees as she had the right to do.

A very acute and exhaustive analysis of the New York law of charity will be found in the case of *Utica Trust & Deposit Co. v. Thomson* (87 Misc. Rep. 31). While the facts in that case do not closely resemble those now under consideration, I have found Mr. Justice EMERSON's reasoning and conclusions of great assistance. I have not regarded the case of Attorney-

General v. Soule (28 Mich. 153) as a controlling authority. It is cited by Judge CHASE in his opinion in the Shattuck case, but was quite unnecessary to that decision and is much more stringent in its limitations upon charitable bequests. I am of the opinion that it does not state correctly the law of our State upon this subject.

The complaint also questions the validity of clause "Fifthly" of the will, whereby certain real and personal property is given to James W. Christopher, "in trust, nevertheless, for the purpose of building a Catholic Church; the same to be held by the said James W. Christopher for the period of three years, and if no action is taken during said period toward building a church, then * * * to the said James W. Christopher absolutely." The value of this gift is only about \$550. If I am correct in sustaining the residuary clause, the only parties interested in avoiding this gift are the New York Skin and Cancer Hospital, and the People of the State representing the school trust, but neither of these parties has challenged the validity of this clause, either by way of answer or of argument or of request for findings. Plaintiffs' counsel contend in their brief that the gift is valid on the ground that since the statute above cited charitable bequests are no longer subject to the rule which prohibits the suspension of the power of alienation for a term of years. With some hesitation I accept this conclusion and hold the disposition valid. The court should not be astute to award to parties property which they do not claim.

It appeared upon the trial that plaintiffs desire to be relieved from responsibility as trustees of the school fund and have arranged with the Attorney-General that the fund shall be paid over to the supervisor of the town of North Salem and the district superintendent of schools of the supervisory district in which said town is located, pursuant to article 19 of the Edu-

cation Law,* and I am requested to order judgment accordingly. I do not question the wisdom and propriety of this course, but I find nothing in the order of reference authorizing me to deal with the subject. It is not referred to in the pleadings, and my jurisdiction as referee is limited to the determination of the issues in the action.

In the Matter of the Probate of the Last Will and Testament
of VIRGILIO DEL GENOVESE, Deceased.

JOSEPH DEL GENOVESE, Appellant; FIDALMA DEL GENOVESE
and FRANCESCA DEL GENOVESE, Respondents.

(*Supreme Court, Appellate Division, Second Department, July 30, 1915.*)

**WILL—REVOCATION BY SUBSEQUENT MARRIAGE AND BIRTH OF ISSUE—EFFECT
OF ACQUISITION OF ADDITIONAL PROPERTY—PRESUMPTION OF REVOCATION.**

The question whether an ante-nuptial will has been revoked under section 35 of the Decedent Estate Law by a subsequent marriage and birth of issue must be determined by the state of facts and the condition of the testator's property at the date of the will.

Hence, proof of the acquisition of additional property after the making of such a will cannot avail to prevent its revocation under the statute.

Under section 35 of the Decedent Estate Law, marriage and parenthood do not raise a presumption of an intent to revoke, but are in themselves a revocation, unless express provision be made in view of the new duties arising from the changed relation.

Mere accumulation of property in addition to that possessed at the date of the ante-nuptial will cannot be considered as a "provision" made by the testator for the new dependents upon him as a husband and father.

APPEAL by Joseph Del Genovese from an order of the Surrogate's Court of the county of Kings, dated the 31st day of March, 1915, denying motions for leave to renew an application

* Consol. Laws, chap. 16 (Laws of 1910, chap. 140), art. 19.—[REp.]

to open the decision and decree of December 19, 1907, herein, refusing probate to a will.

On this appeal a subsequent accounting by the administratrix of the estate is proffered as further evidence to support the **motion**.

William H. Hamilton (Norman C. Conklin with him on the brief), for the appellant.

Walter Carroll Low, for the respondent Fidalma Del Genovese.

Outerbridge Horsey, for the respondent Francesca Del Genovese.

PUTNAM, J.—Virgilio Del Genovese, in 1886, made a will, which purported to bequeath \$10,000 to his brother Joseph, the present appellant. He married thereafter, and this marriage legitimized his daughter Francesca. In January, 1907, he died resident of Kings county. By reason of the statutory revocation by the marriage and birth of issue, the will has been denied probate. The original contest turned on the marriage, as Mrs. Del Genovese's prior marriage raised a question whether this earlier status had been legally dissolved. (Matter of Del Genovese, 56 Misc. Rep. 418.) A decree was made on December 19, 1907, refusing probate of the will, which was unanimously affirmed here. (136 App. Div. 894.)

Pending this appeal, and in April, 1908, appellant had made an application to open this decree, so as to grant a new trial and a rehearing of the issues, and "an opportunity to offer testimony and proof as to the value, amount, and extent of the real and personal estate of which the said Virgilio Del Genovese, now deceased, died seized and possessed and to establish the extent thereof in excess of \$10,000;" to show that only a por-

tion of said estate of said decedent was disposed of, and said alleged will was not revoked.

This application was denied by the surrogate, after hearing, and no appeal was taken therefrom.

Thereafter matters rested until January, 1915, when the appellant again renewed this earlier application to reopen the decree and go into the value of the estate, and to show probable assets or claims approximating \$80,000 against the government of Venezuela. The petition stated that another brother, Alfredo, had formerly represented to appellant that the estate was insolvent, but that thereafter the government of Venezuela, through the United States, had actually paid over to the administratrix the sum of \$70,000. Other averments of the property of the estate were set forth.

After a hearing, this application was denied by order of the surrogate dated March 31, 1915, from which the petitioner has taken this appeal.

The extraordinary laches of appellant were perhaps grounds to deny the leave to renew his motion made and denied in 1908, but we are clear that the denial was correct on the merits. Although the ante-nuptial will had no residuary clause, and did not say that the \$10,000 legacy exhausted the testator's estate at the time of execution, it is not controverted that the will, when made, disposed of quite the whole estate as it then existed. It is argued, however, that as wills are ambulatory, the state of things determining this question is to be taken as at decedent's death; but this does not apply to the revocation implied by law from marriage and the birth of a child.

Section 35 of the Decedent Estate Law (Consol. Laws, chap. 13; Laws of 1909, chap. 18) provides: "Revocation by marriage and birth of issue. If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his

lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; *and no other evidence to rebut the presumption of such revocation, shall be received.*" (Re-enacting 2 R. S. 64, § 43.)

The steps in accepting this doctrine of implied revocation by marriage and birth of children borrowed from the civil law are set forth in *Brush v. Wilkins* (4 Johns. Ch. 506) as far as the law stood in 1820. KENT, Chancellor, there showed that the common-law courts had at first been reluctant to follow this inference of intention. The presumption of revocation by such family changes, however, might be then rebutted by parol evidence. This, however, he regarded as dangerous, saying: "Courts would be running the hazard of substituting their will for that of the testator." (p. 519.)

In this state of the law, the revisers in 1827-1828 put in the clause, which took effect on January 1, 1830, excluding all evidence to rebut the presumption of revocation, except (a) unless a provision be made for such issue by some settlement; or (b) unless the issue shall be provided for in the will; or (c) in such way mentioned therein as to show an intention not to make such provision. (2 R. S. 64, § 43.)

In their original note the revisers explained: "Marriage and the birth of issue have long been held in England to operate as a presumptive revocation of a will previously made; but there has been much litigation, and there is still much uncertainty in regard to some of the qualifications of the rule. In 4 Johns. Ch. Rep. 506, Chancellor KENT applied the rule to a case before him, and discussed some of the doubtful points above alluded to. The importance of the principle itself, and the doubts that are connected with it, have induced the revisers to prepare the

above section, in which they have endeavored to state the rule as now recognized by the courts, and to incorporate in it all the circumstances which, in their judgment, ought to be admitted, to repel so just and reasonable a presumption. Whether parol evidence is admissible to rebut the presumption, is doubted by Chancellor KENT in the case referred to, but its admissibility seems to be established by recent decisions in England. Such evidence, in cases of this sort, must always be dangerous, and is therefore excluded by the revisers." (3 R. S. [2d ed. 1836], Appendix, p. 631, § 50; same as 2 R. S. 64, § 43.)

It is the change by marriage and parenthood that the law presumes were not in the mind of the maker of the ante-nuptial testament. If this question were to remain in suspense, so that the will might still be revived by a later windfall augmenting the estate, then there would be no certainty in the rule of testacy. Under our statute marriage and parenthood do not raise a presumption of an intention to revoke, but are in themselves a revocation, unless express provision be made in view of the new duties arising from the changed relation.

After much deliberation it has been settled that the rules applicable have reference to the existing state of facts at the time the will itself was made. (*Israell v. Rodon*, 2 Moore P. C. 51.) It follows that subsequent acquisition of property, and an augmenting of the estate after the execution of such ante-nuptial will, cannot prevent this revocation which rests on the situation when the will was executed. (*Marston v. Roe*, dem. Fox, 8 Ad. & El. 14.)

Mere accumulation of property in addition to that possessed at the date of the ante-nuptial will cannot, upon any ground of reason, be considered as a "provision" made by the testator for the new dependents upon him as a husband and father. (*Baldwin v. Spriggs*, 65 Md. 373.)

Even before the New York statute took effect, an increase of the testator's property did not prevent this implied revocation.

In a case of marriage and birth of children, and death in 1807, BRONSON, J., held the will had been revoked by implication of law, and ordered a new trial. On such new trial, proof, *inter alia*, was offered that the testator was seized of other real estate besides the premises in question, of the value of \$4,000 in the whole, but this, with other evidence, was excluded and such exclusion was affirmed. (Havens v. Van Den Burgh, 1 Den. 27, 31, 32.) Revocation in such circumstances works no hardship. It brings about a descent and distribution under the just and politic rules prescribed for intestacy and aimed for the care and protection of children.

Under the prohibition of our statute, therefore, proof of increased property after the making of the will cannot avail to repel the statutory rule to revoke a disposing testament not being made in view of marriage and parenthood, with no provision in the will, or out of it, looking to such duties. The surrogate, therefore, rightly denied the appellant's motion.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

JENKS, P. J., THOMAS, STAPLETON and MILLS, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

ANNA ISABELLE HUTCHINSON, Respondent, *v.* JOSEPH T. McCADDON and THEODORE D. McCADDON, Individually and as Executors of and Trustees under the Last Will and Testament of RUTH LOUISA BAILEY, Deceased, and LILLIE ELIZABETH HARPER, Appellants, Impleaded with RALPH GAGE SPENCER, Respondent, and ANNA LOUISA HUTCHINSON and THE WOODLAWN CEMETERY, Defendants.

(*Supreme Court, Appellate Division, Second Department, July 30, 1915.*)

WILL—EVIDENCE INSUFFICIENT TO ESTABLISH UNDUE INFLUENCE.

Plaintiff brought an action to contest the validity of her sister's will upon the ground that it had not been properly executed, and that the testatrix was of unsound mind and physically weak, but the only issue submitted to the jury was the question whether or not the execution of the will had been procured by the undue influence of a brother of the testatrix. A verdict in favor of the defendants was set aside for the erroneous admission of statements by the testatrix subsequent to the execution of the will as to why she did not make the plaintiff "an heir" and as to the criticisms upon the conduct of her nephews subsequent to the execution of a prior will. *Held*, on all the evidence, that the plaintiff did not sustain the burden of proof which was upon her, even though the evidence claimed to have been erroneously admitted, be disregarded, and that the verdict should be reinstated.

APPEAL by the defendants, Joseph T. McCaddon and Theodore D. McCaddon, individually and as executors and trustees, and another, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 1st day of February, 1915, setting aside the verdict of a jury in their favor, and granting plaintiff's motion for a new trial.

Delevan A. Holmes (Charles P. Rogers with him on the brief), for the appellants.

Arthur M. Johnson (John T. Bottom with him on the brief) and J. H. Auchincloss, for the respondents.

JENKS, P. J.—The plaintiff contests the will of her sister, Ruth Bailey. Upon the sole issue submitted, namely, whether the will was procured by the undue influence of the defendant J. T. McCaddon, who was a brother of the said testator, the jury found for the defendants. But the learned justice who presided set the verdict aside for erroneous admission of testimony. The testimony was of statements made by the testator subsequent to the execution of the will, why she did not, as she once expressed it, make the plaintiff "an heir," and which involved strictures upon the conduct of her nephews subsequent to the execution of a prior will. The issues originally tendered by the plaintiff comprised failure of proper execution of the will and the unsound mind and physical weakness of the testator to the extent of testamentary incapacity. As we understand it, the learned trial court thought it erred because, at the close of the plaintiff's case, it had announced that it would submit to the jury only the question of undue influence, and, therefore, that such testimony was inadmissible on the question of fraud or duress. (*Waterman v. Whitney*, 11 N. Y. 157; *Smith v. Keller*, 205 id. 39.)

We think that the verdict should be reinstated, because it is obvious that with such testimony rejected the plaintiff should not have gained a verdict. (*Rogers v. Wheeler*, 52 N. Y. 262; *McGean v. Manhattan Railway Co.*, 117 id. 219; 38 Cyc. 1437.)

The testator was the childless relict of Bailey, who accumulated a large fortune as a showman. The will was made in 1908, and the testator died in 1912. After some comparatively small bequests, she conveyed the residuary estate of about \$1,500,000, to her two brothers as trustees, with directions that in the event of the survival of the plaintiff they should provide for a life annuity to her of \$10,000 per annum; that upon her death the *corpus* set apart for such annuity should revert to the residuary estate. She provided that the residuary estate should be paid absolutely and equally to her said two brothers

and her sister, Lillie Harper, with directions that in case of the death of any of them without issue, there should be equal distribution to the survivors.

The general scheme was in recognition of natural claimants, and it was abnormal only in the discrimination against the plaintiff. The effect of that discrimination was to cut off the children of the plaintiff from any benefit under the will or through any disposition which the plaintiff might make if any absolute estate had been given to her. The plaintiff shows that in 1906 the testator made a former will, whereby she provided for the plaintiff as for her other brothers and sisters. She adduces proof to show the testator's feelings towards her nephews and towards McCaddon respectively. She adduces proof that McCaddon lived with the testator, was always at her elbow, had a large part in the management of her affairs, and that he was bitter against his said nephews. The nephews had risen to responsible positions in the employ of the testator's husband. And there is proof that he and the testator for a long time held them in high affection. There is proof that McCaddon once had left such employ to set up a rival show, and that the testator and her husband condemned what they considered his disloyalty in unmeasured terms. But there is also proof that permits the inference that, prior to the death of the testator's husband, he, the testator and McCaddon were on friendly if not intimate terms. And there is proof that during the period that intervened the making of the first will and the last will, the testator became much displeased with her said nephews because they opposed and sought to thwart her desire to have McCaddon made a director in the corporation which maintained the show, in order that he might co-operate with them, and that this displeasure was great. The testator tried to bring her nephews and McCaddon in harmony, but apparently they could not work together. During that interval

the nephews left the corporation and entered upon other ventures of a similar character, but McCaddon remained until the sale of the corporation.

The facts that the testator once held her nephews in warm affection and once was incensed against her brother, do not import that this woman could not suffer a change of heart. Such change might be ascribed to caprice without the influence of McCaddon. And it might, upon the evidence, be attributed to this subsequent conduct as viewed by the testator. For the proof permits the inference that, as time went on, McCaddon made peace and the nephews made strife, both with the testator.

McCaddon had the opportunity, and the proof permits the conclusion, that he had the animus to deal his nephews a blow through the will of the testator. But that is not enough. There is no contention that he exercised any physical restraint upon the testator. And, although the plaintiff could establish indirectly undue influence, there are no circumstances which permit no other inference than that the testator wrote, not her own will, but that of McCaddon under his coercion and duress. She is described as a woman of strong mind and will, and there is not a bit of evidence to indicate that McCaddon dominated her or effaced her in any way. Undoubtedly she was warmly attached to the plaintiff, but the plaintiff personally is amply provided for as long as she lives. We conclude, then, that the plaintiff did not sustain the burden which was upon her, even though the evidence referred to by the learned trial court is stricken from the record.

The order is reversed and the verdict is reinstated, with costs to the appellants.

CARR, STAPLETON, RICH and PUTNAM, JJ., concurred.

Order reversed and verdict reinstated, with costs to the appellants.

DANIEL J. LEARY, Respondent, v. FREDERICK GELLER, as
Executor, etc., of MARY C. LEARY, Deceased, Appellant.

(Supreme Court, Appellate Division, First Department, July 9, 1915.)

**DECEDENT'S ESTATE—ASSIGNMENT BY NEXT OF KIN—WHEN SUIT TO REFORM
ASSIGNMENT DOES NOT LIE—MUTUAL MISTAKE OR FRAUD ESSENTIAL.**

Where the brother of a decedent, entitled to share in his estate, absolutely and forever assigned all of his interest in the personal estate of the decedent to the decedent's widow, and released and discharged her as administratrix from all claim or demand which he had or might thereafter be entitled to in said estate, he cannot thereafter maintain a suit in equity to reform said assignment by excluding from the operation thereof certain securities formerly owned by the decedent which have turned out to be of value, if the complaint states no mutual mistake of fact, or a mistake of fact on one side and fraud on the other.

A mere allegation that the widow falsely stated to the assignor that her husband had given the securities to her does not necessarily allege fraud on her part, there being no allegation that the statement was made with an intent to deceive the plaintiff and to induce him to execute the assignment.

APPEAL by the defendant, Frederick Geller, as executor, etc., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 1st day of June, 1914, overruling a demurrer to the complaint.

John M. Enright (Benjamin G. Paskus with him on the brief), for the appellant.

Pierre M. Brown, for the respondent.

SCOTT, J.—Plaintiff is one of the children of James D. Leary, who died intestate April 11, 1902. The original defendant herein was Mary C. Leary, widow and administratrix of said James D. Leary, deceased. She having died since the

institution of the action, the present defendant, her executor, has been substituted in her place.

After the death of James D. Leary this plaintiff and his brother, George Leary, and his sister, Marie C. Leary, assigned, transferred and set over unto Mary C. Leary, the widow, her heirs, executors, administrators and assigns absolutely and forever, all of the part, share or interest of each of the assignors in and to the personal estate of said James D. Leary, and on the same date this plaintiff released and discharged said Mary C. Leary, as administratrix of said James D. Leary, of and from any and all claim or demand which said plaintiff then had or might thereafter be entitled to in said estate. The purpose of this action is to reform the aforesaid assignment and release by excluding from the operation thereof certain securities and the income and profits derived therefrom, by compelling the said Mary C. Leary (or her executor) to account to plaintiff for his proportional share of said securities and the income and profit derived therefrom as if the aforesaid assignment and release had never been made, or, having been made, did not apply to and cover the said securities.

The complaint alleges that James D. Leary in his lifetime had owned and been in possession of the securities mentioned, said to have been of large but uncertain value; that a short time before his death said James D. Leary filled out transfers of said securities in the name of Mary C. Leary and, with plaintiff's aid, signed the same; that shortly after the death of said James D. Leary, and before the execution and delivery of the assignment and release now sought to be reformed, plaintiff was informed by said Mary C. Leary that her deceased husband had given and delivered said securities to her before his death, and thereupon plaintiff, at her request and acting upon the belief that said securities had been so delivered to said Mary C. Leary, caused said securities to be transferred upon the books of the various corporations and new certificates issued to said

Mary C. Leary; that "the execution of the transfers made by deceased of said stocks and the statements aforesaid of Mary C. Leary created in the mind of plaintiff the belief that said securities had been given and delivered to Mary C. Leary by deceased, and solely in reliance upon this mistake and belief" plaintiff executed the assignment and release now sought to be reformed. It is further alleged that no consideration passed to plaintiff for the execution of either of said documents; that said securities were never given or delivered by deceased to said Mary C. Leary, nor were they ever her property and that she continued to claim and possess them until about December 30, 1913, when she admitted that the same were part of the personal estate of said James D. Leary, deceased, and accounted for them and their income and profits as administratrix.

It is stated in the complaint that the securities in question constituted only a part, although the larger part, of the estate of said James D. Leary, and plaintiff does not deny that his purpose and intent by the assignment and release was to convey and confirm to the widow all of the personal estate of said James D. Leary, but he leaves the inference to be drawn that he so intended because he did not know how much that estate amounted to, and if he had known he would not have been so generous.

The difficulty with the complaint is that it fails to state a case for reformation within the well-established rule that an action for the reformation of a written instrument will not lie unless there has been a mutual mistake of fact by the parties to it, or a mistake of fact on the one side and fraud on the other.

Neither of these conditions is stated in the complaint. No mistake as to the fact is alleged as to Mary C. Leary, nor is any fraud charged against her. It is true that it is alleged that she stated that her husband had given her the securities before his death, whereas the fact is that he had not done so.

But this contradiction does not necessarily spell fraud on her part for it is nowhere alleged that she made this statement with the intent to deceive plaintiff or for the purpose of inducing him to execute the assignment and release. In short, nothing more is alleged in the complaint than a mistake on the part of plaintiff as to the ownership of the securities. This is not enough to maintain an action in equity for a reformation. The court at Special Term did not consider the complaint as charging fraud upon Mary C. Leary, but treated the action as one based on the ground of a mutual mistake of fact (see *Leary v. Leary*, 85 Misc. Rep. 591), but it is obvious upon a reading of the complaint that the only mistake of fact charged was that of plaintiff. The objection now urged by defendant that there is a defect of parties defendant, in that the brother and sister who joined in the execution of the assignment should have been joined as defendants, is not raised by the demurrer.

The order appealed from must be reversed, with ten dollars costs and disbursements, and the demurrer sustained, with costs, with leave to plaintiff to amend the complaint within twenty days upon payment of said costs.

INGRAHAM, P. J., CLARKE, DOWLING and HOTCHKISS, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, and demurrer sustained, with leave to plaintiff to serve amended complaint on payment of costs in this court and in the court below.

WALTER B. WELLBROCK, Respondent, v. EDWARD RODDY and Others, Appellants, Impleaded with JACOB H. KOHLMAN, Individually and as Executor of and Trustee under the Last Will and Testament of HENRY WELLBROCK, Deceased, and Others, Defendants.

(*Supreme Court, Appellate Division, Second Department, July 30, 1915.*)

WILL—PLEADING—COMPLAINT TO SET ASIDE CONVEYANCE BY EXECUTORS—
ILLEGALITY OF SALE ADMITTED BY DEMURRER—WILL CONSTRUED—
DISCRETIONARY POWER OF SALE.

Where the complaint in an action brought by an heir at law and devisee to set aside a conveyance of lands made by executors alleges that the conveyances were made "for no purpose provided for by the will, and in contravention thereof; * * * of all of which facts * * * each of the defendants * * * had notice," a demurrer admits the truth of such allegation, and hence will be overruled, although the will itself by another provision vests the executors with a discretionary power of sale.

It seems, that a will which states that "for the purpose of carrying out the provisions of this, my will, without being in contravention of same, I authorize and empower my qualifying executors * * * to sell and convey at any time all and any piece of my property, when in their judgment they shall deem it necessary and advisable," confers upon the executors a power of sale in their own discretion. The words relating to a sale "in contravention" of the will are superfluous and in no way limit the discretion of the executors.

APPEAL by the defendants, Edward Roddy and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 29th day of October, 1914, overruling their demurrers to the amended complaint.

Lynn C. Norris (Edward M. Perry with him on the brief), for the appellants.

Louis J. Altkrug, for the respondent.

THOMAS, J.—The executors of Henry Wellbrock, purporting to execute a power of sale, conveyed land to each of the appellants. The plaintiff is an heir at law of the decedent and one of the devisees of the remainder and seeks to set aside the conveyances, to partition the land conveyed and other property and to compel the executors to account. The appeal is from a judgment overruling demurrers to the complaint upon the ground that it does not state a cause of action against the purchasers, and that it improperly joins causes of action. The will, among other things, gives the residue of decedent's real estate to the executors in trust to receive and to collect the rents and profits, pay the taxes, interest on mortgages and insurance, etc., and thereafter pay to the widow during her life the annual sum of \$720 for the support of herself and unmarried daughters living with her, as well as for their education, or in case there be not such dependence of unmarried daughters, to pay her the annual sum of \$480. It further directs the executors "to apply the remainder of said rents, with interest thereon, towards paying my just and lawful debts and paying and discharging all or any mortgages which are liens on any of my property," and to accumulate a fund for that purpose by depositing the rents as directed. The parties agree that the provision for accumulation is void, and the court correctly decided that it should be paid to the testator's children. They were presumptively entitled to the next eventual estate. The 6th clause of the will directs that upon the remarriage or death of the widow the executors shall convert the whole estate into cash and divide the net cash assets among the testator's children, share and share alike, with a substitutionary provision for the issue of a child dying. The obvious purpose of that power of sale was to facilitate distribution. But a larger, though may be not unlimited, power was given by the 8th subdivision of the will, "*For the purpose of carrying out the provisions of this, my will, without being in contravention of the same, I authorize*

and empower my qualifying executors * * * to sell and convey at any time all and any piece of my property when, in their judgment, they shall deem it necessary and advisable," and to execute necessary instruments of conveyance. The amended complaint alleges that the conveyances were made "for no purpose provided for by the will, and in contravention thereof; * * * of all of which facts in this paragraph alleged, each of the defendants * * * had notice." It would have been sufficient to decide that, as the demurrer admitted that the grant was in contravention of the will and the grantee had notice of it, the grant is void in each instance. The appellants contend that the trustees had the discretion to determine (1) whether the sale was necessary for the purpose of carrying out the terms of the will; (2) when the sale should be had. Admitting that for the moment, the sale could not be valid if the grantee had notice that the sale was in contravention of the will. It would have been sufficient for the trial court to stop there, and overrule the demurrer. But it went farther and decided that the executors had no discretion to determine with finality whether the purpose of the will demanded the sale, that under the allegations of the complaint such purpose was not subserved, that the conveyance was at the risk of the grantee, and that he was not protected by the exercised discretion of the trustees. That conclusion may be examined. The power is given to carry out the provisions of the will. It is quite unnecessary to say that in terms, as it would be a necessary implication. Nothing effective is added by the further words, "without being in contravention of the same." The power could not be exercised for the purposes of the will and be at the same time in contravention of it. The authorization to the executors is to sell "at any time all and any piece of my property when, in their judgment, they shall deem it necessary and advisable." The respondent proposes, as I understand, that the executors may decide at what time it is necessary and advisable to sell, but

cannot decide whether any purpose of the will makes it necessary and advisable. If their discretion is limited to the mere time of selling, the word "necessary" is used with scant propriety. For, when the executors decided that the day is at hand when it is necessary to sell, they must determine the exigencies of the estate on that day. If the purposes of the will demand that the property be sold in whole or in part, nothing is gained by authorizing the executors to decide at what time it is necessary to sell. It would be useful to permit them to pass upon the advisability of selling at a particular date, even though they could not pass upon the necessity of selling. But where they are to decide when it is necessary to sell, they thereby must pass upon the necessity of selling at all. Does the will mean that the question whether any sale is necessary depends upon facts which the executors cannot consider and decide? How could executors intelligently and conscientiously make a sale without considering the facts and deciding upon necessities of the estate and whether some of the land must be sold? Of course they must do so. But even if they must consider and decide, does their decision have no force even in behalf of a *bona fide* purchaser? Must he also investigate the condition of the estate, consider its necessities and whether they are such as to authorize the executors to sell? If that be so, of what use is the decision of the executors? Indeed, of what use the investigation of the purchaser, if the court may decide that he made erroneous conclusion and that the executor's decision decides nothing whatever, except as to the time of sale? That would make the power of sale a mere trap for the best-intentioned purchaser, and practically renders the land unmarketable, for no one would purchase at a provident price if the title depend upon, may be, complicated extrinsic facts of which there is no arbiter except the court. A will should read plainly to that effect if such was the purpose. While it is, perchance, possible to relate the word "necessary" solely to the time of selling, it is difficult to believe

that the testator intended to use it in such restricted sense. I think that he meant to say that the executors should sell the land in whole or part when they deemed it necessary and advisable. As I have said, the sentence would have the same meaning if there were entire omission of the words "for the purpose of carrying out the provisions of this, my will, without being in contravention of the same." The cases instanced by the respondent are lacking in the essential element that no discretion to determine the necessity of selling is confided to the grantees of the power. In *Griswold v. Perry* (7 Lans. 98) the trustees were authorized to sell only in case of deficiency of income to support the testator's daughters, and it was decided that a conveyance under the power was void, as it appeared that there was no such deficiency. But the will did not give the trustees any apparent authority to determine the fact. In *Briggs v. Davis* (20 N. Y. 15) the grantees of land in trust for creditors reconveyed to the grantor by deed which erroneously recited that the trusts had been executed. It was decided that a mortgage of the land by the debtor for a valuable consideration was void as against the trustees and those claiming under them. This was merely an attempt by a trustee and the maker of the trust to convey in contravention of it. It was not done in furtherance of the trust, nor did the trust instrument leave anything to the trustee's decision or discretion. *Russell v. Russell* (36 N. Y. 581) is to the effect that a power to an executrix to sell real estate "as she shall deem most expedient and for the best interest" of certain legatees was not well executed by a conveyance of a portion of the land to one legatee in payment of a debt due from the testator to the legatee. It could not be clearer that the language of the power contemplated nothing like that, and the attempted execution of the power was perverse on its face. Some other cases cited by respondent (*Kirsch v. Tozier*, 143 N. Y. 390; *Shepherd v. McEvers*, 4 Johns. Ch. 136) support the contention that a purchaser must

take notice of the limitation of the power of the trustee, a proposition too plain to discuss. In the case at bar the purchaser was obliged to trace the executors' authority, but the question is whether he did not find it in the will. But it is said that the matter is set at rest by *Smith v. Peyrot* (101 N. Y. 210). The action was by a broker to recover commissions for attempting to procure, at the instance of executors, money to be secured by mortgage on property of the estate. A title company refused to make the loan because it discovered that the executors were not authorized to borrow the money for a purpose not contemplated by the will, although they were empowered in their discretion to sell, convey and mortgage any or all of her real estate "for the purpose of carrying out the provisions of this instrument." It is quite evident that the will showed that the executors had no power to give the mortgage for the purpose in view, and as the title company knew that, it could not accept the mortgage. But the rights of a purchaser in good faith were not involved. But the question here is whether the will gave the executors power to decide a fact that involved the condition of the estate, and, if so, it falls within the rule supported by a long line of cases. Of such are *Hancox v. Meeker* (95 N. Y. 528); *Roseboom v. Mosher* (2 Den. 61); *Haight v. Brisbin* (96 N. Y. 132); *Carroll v. Conley* (9 N. Y. Supp. 865; *affd.*, 124 N. Y. 643); *Hovey v. Chisolm* (56 Hun, 328). The language in the case at bar is not the same as, nor is it as complete and clear as in the cases cited, but in my judgment the testator intended just what the sentence says, that the land should be sold when the executors deemed it necessary and advisable.

The interlocutory judgment should be affirmed for the reasons already stated, with costs, with leave to the appellants to answer within twenty days upon payment of costs.

JENKS, P. J., STAPLETON and RICH, JJ., concurred.

The parties hereto having stipulated in open court that this case may be disposed of by a court of four, the decision is as follows: Interlocutory judgment affirmed, with costs, with leave to the appellants to answer within twenty days upon payment of costs.

In the Matter of Proving the Last Will and Testament of
GEORGE W. HORTON, Deceased.

ALICE M. HORTON, Contestant, Appellant; JANE ANN DICKIE,
Proponent, Respondent.

(*Supreme Court, Appellate Division, Second Department, July 30, 1915.*)

**WILL—PROBATE—EVIDENCE OF DOMICILE OF TESTATOR—RECORD OF PROBATE
IN FOREIGN STATE OF SUBSEQUENT WILL.**

In a proceeding for the probate of a will a record of the proceedings of the Probate Court of Ohio, including an order admitting to probate a later will of the testator, authenticated in compliance with section 905 of the United States Revised Statutes, offered in evidence for the purpose of establishing the later will and the revocation of the will in question, is not a bar to an inquiry as to the domicile of the testator; it is not even competent evidence of the fact of domicile, where neither the proponent nor the heirs at law nor next of kin were parties to the proceeding. Hence, the surrogate has power to decide that the testator was a resident within his jurisdiction.

APPEAL by Alice M. Horton, contestant, from a decree of the Surrogate's Court of the county of Westchester, entered in the office of said Surrogate's Court on the 4th day of December, 1914.

M. Linn Bruce (William H. Sommer with him on the brief),
for the appellant.

Henry G. K. Heath, for the respondent.

STAPLETON, J.— The appeal is from the decree of the Surrogate's Court of Westchester county, admitting to probate a paper writing bearing date April 5, 1902, as the last will and testament of George W. Horton, deceased, relating to real and personal property. Grandchildren are the beneficiaries. The petition propounding the will was verified September 18, 1913. Citation issued September 22, 1913, and was served on the contestant on September 29, 1913. In this paper the decedent described himself as a resident of the city, county and State of New York. The petition alleges that the decedent was a resident of Westchester county at the time of his death and that he left real and personal property therein. His only heirs at law and next of kin are a daughter, Jane Ann Dickie, and a granddaughter, Elsie Marguerite McLure. He was survived by a widow, to whom he was married shortly before his death, Alice M. Horton. The daughter was named as sole executrix in the will, and she is the proponent.

The widow appeared in the proceeding and opposed the application for probate. She filed a verified answer in which she alleged: The paper propounded was not the decedent's will; on the 8th of August, 1913, at Painesville, Lake county, O., he made, published and declared a certain paper to be his last will and testament; in it he described himself as domiciled at that place; he made his wife sole beneficiary and revoked all other and former wills; he was a resident of Lake county, where he died on the 14th day of September, 1913; the paper was proved in the Probate Court of Lake county, O., as the last will and testament of the testator; and that court issued its letters testamentary to the executrix named in the will. She prayed for an order dismissing the proceedings. The surrogate conducted a hearing. Proof was made of the following facts:

The Constitution and laws of Ohio establish a Probate Court in each county as a court of record, with exclusive jurisdic-

tion to take proof of wills and to grant or revoke letters testamentary. (See Ohio Const. art. 4, §§ 1, 7, 8; Ohio Gen. Code, § 10492.) The laws of that State provide: "No will shall be admitted to probate without notice to the widow or husband and next of kin of the testator, if any, resident in the State, in such manner and for such time as the Probate Court directs or approves." (Ohio Gen. Code, § 10507.) Proof must be made in open court. If it appears that such will was duly attested and executed, and that the testator at the time of executing it was of full age, of sound mind and memory, and not under restraint, the court shall admit the will to probate. The will must be filed and the testimony taken, recorded and preserved. A certified copy of the will and order of probate annexed thereto is made effectual proof of the original. If within two years (statute reads one year) after probate had, no person interested appears and contests the validity of the will, the probate shall be forever binding, saving, however, to persons of unsound mind, to infants, or to persons in captivity, a like period after the disability is removed. In case of petition filed to contest the validity of a will, provision is made for the transfer of the record to the Common Pleas Court. Wills proved in other States relative to property in Ohio are admitted to record. The validity of a will may be contested in the Common Pleas Court of the county where the probate was had. All the devisees, legatees and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to the action. Trial by jury is required. For the trial the order of probate is made *prima facie* evidence of the due attestation, execution and validity of the will. The right to prosecute error shall be the same as provided in other cases brought in Common Pleas. The action must be brought within a year after probate except in case of prescribed disabilities. (See Ohio Gen. Code, §§ 10516, 10519, 10525, 10529, 10531, as amd. by Laws of 1913,

p. 173; Id. §§ 10534, 10535, 12079, 12080, 12082, 12083, 12086, as amd. by Laws of 1913, pp. 405, 428; Id. § 12087, as amd. by Laws of 1911, p. 308.) It had been decided in Ohio that in the proceeding authorized for admitting a will to probate, persons interested in resisting its probate are not allowed to introduce evidence to contest its validity; nor is it required that those who are interested adversely should be summoned, as no issue is made for a contest between adverse parties. (Matter of Hathaway, 4 Ohio St. 383; Matter of Jones, 2 Ohio N. P. 194.) A statute provides: "When a will, claimed to have been executed by a person domiciled in this State, is presented for probate in a county thereof, persons interested in its probate may contest the jurisdiction of the court to entertain the application." (Ohio Gen. Code, § 10520.)

The contestant offered in evidence, authenticated in strict compliance with section 905 of the Revised Statutes of the United States, a record of the proceedings of the Probate Court of Lake county, O., including an order admitting to probate the paper writing there proposed as the valid last will and testament of George W. Horton, deceased, late of that county, and an exemplified copy of the letters testamentary issued therein. The purpose of the offer was to establish a later will conclusively proved and the fact of the revocation of the former. The documents were excluded upon objection. To the ruling exception was taken. This ruling is asserted to be reversible error.

The respondent, against the appellant's assertion, contends that the decree of the Ohio court did not bar inquiry into the domicile of the decedent; that it was not even competent evidence of the fact of domicile, as neither the proponent, nor the heirs at law, nor the next of kin, were parties to the proceeding in which the decree was made; that the surrogate of Westchester county had the power to decide that the decedent was

a resident within his jurisdiction; and, if he so decided, that he had jurisdiction of the probate of the decedent's will.

Sustained by authority, we approve this contention and affirm the decree, with costs. (*Overby v. Gordon*, 177 U. S. 214; *Tilt v. Kelsey*, 207 id. 43.)

JENKS, P. J., THOMAS and RICH, JJ., concurred.

The parties hereto having stipulated in open court that this case may be disposed of by a court of four, the decision is as follows: Decree of the Surrogate's Court of Westchester county affirmed, with costs.

CHARLES P. EVANS, Respondent, *v.* ROBERT TRIMBLE, Individually and as Executor, etc., of ELIZABETH T. EVANS, Appellant, Impleaded with MARGARET J. TRIMBLE and Others, Defendants.

(*Supreme Court, Appellate Division, Third Department, September 15, 1915.*)

WILL—EXECUTION—WILL CAUSING INTESACY AS TO PERSONAL PROPERTY—FAILURE TO READ INSTRUMENT TO TESTATRIX—WILL BENEFICIAL TO ATTORNEY WHO DREW IT—PRESUMPTION OF FRAUD.

Appeal from a judgment determining that a will admitted to probate was not the will of the testatrix because of the execution by her of a later will. In her first will the testatrix gave to her husband the life use of her realty and household furniture, the remainder to go to her brothers and sisters or their descendants. It was shown that the testatrix had expressed a desire to change her will because of some dissatisfaction on the part of a relative and that, she being in a critical condition and under the influence of opiates, her husband, a lawyer, drew a second will which she signed without having had the same read over to her. The second instrument disposed of the realty only, leaving her intestate as to her personal property, including \$5,000 in the bank, which will go to her husband under the statutes of distribution. On all

the evidence, *held*, that the husband failed to rebut the presumption of fraud arising from the fact that, being an attorney at law, the will was favorable to him, and that the second instrument was not the will of the testatrix and not entitled to probate.

WOODWARD, J., dissented, with opinion.

APPEAL by the defendant, Robert Trimble, individually and as executor, etc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Albany on the 15th day of January, 1915, upon the decision of the court, both sides having moved for the direction of a verdict at the close of the case, and also from an order entered in said clerk's office on the same day, upon which order the said judgment was entered.

The judgment determined that a paper dated June 17, 1910, admitted to probate as the will of Elizabeth T. Evans, deceased, is not the will of said decedent, because of the execution of a later will dated March 19, 1912.

R. H. Gillet (P. C. Dugan of counsel), for the appellant.

Willis E. Heaton (Alvin E. Mambert of counsel), for the respondent.

KELLOGG, J.—The chief beneficiary prepared the will and caused its execution. The witnesses saw it signed, but the contents were not made known to them or to the testatrix at the time. No one but the husband knows whether or not she understood its contents and effect. He is a lawyer. June 17, 1910, she made her will in which she only gave him the use of the house and furniture during his life, and at his death it went to her brothers and the descendants of a deceased brother. The real estate was worth about \$2,350, and she had \$5,000 cash in the bank. The principal part of the money came from her deceased brother; the real estate from her mother. She was fifty-

eight years of age and had been married to her husband for ten years; part of the time they had lived separate from each other. She was taken suddenly sick, was in a great deal of pain and was put under the effect of opiates. She had told one of the witnesses some time before that she desired to make some changes in her will; that her brother's son was not satisfied; that she had received a letter from him and that she would fix it so that he would be satisfied. This is the only evidence, aside from the will itself, of any intent upon her part to change her will. The will of March 19, 1912, now in question, directed the executor to sell the house and furniture, gave one-quarter of the proceeds to the husband, one-quarter to her brother James, one-quarter to her brother Robert and one-eighth each to John and Sarah, the son and daughter of a deceased brother. By the first will her residuary estate was to go equally to her brothers and John and Sarah, the children of her deceased brother William, after the payment of some small legacies. The brother Robert is made the executor of both wills. The principal difference between the first will and the second is that there is no residuary clause in the second will and it expressly revokes the former will, and, there being no children, she dies intestate as to her personal property, and under the law he takes it as surviving husband. The circumstances require explanation. Clearly the second will is not as favorable to her nephew, for whom she claimed she was making the change, as the former will. If the second will had directly given the personal property to the husband, and there was a reasonable probability that she knew its contents, the situation might be different. The testatrix was in a critical condition, and might easily have been imposed upon. The husband gets the personal property by a construction of law placed upon the second will, which the testatrix could not understand. If by it he intended to get the personal property it called for an explanation to the testatrix, and he should satisfy the court that she knew the

effect of the will. The will is the act of the husband, a lawyer, who has made himself the chief beneficiary of his wife, when the former will, and this will, so far as the language goes, indicates that she did not have that intention. If she intended to make him the chief beneficiary of the will we would expect the will to say so, and would expect that he would be made the executor. We would not expect it to be done by indirection, and in a manner which only a lawyer could understand. If this will had been read to the testatrix and the witnesses they would not have been able to understand that by it the husband was getting substantially all of the personal property and was the chief beneficiary; they naturally would have understood that he was only benefited to the extent of a quarter interest in the real estate. Clearly, if she intended to give the money to her husband, she would not have framed the will in the manner in which it appears, and there would be no good reason why he should have it framed in that way. The circumstances of this will show clearly the wisdom of the rule that when a lawyer writes himself as chief beneficiary in a will he must establish that the will is not his will but the will of the testator.

We conclude, therefore, that the paper of March 19, 1912, is not the will of the testatrix, but was an instrument which the husband imposed upon her, and which she did not understand. It was his will, and not her will.

I favor a reversal of the judgment and order, upon the law and the facts, with costs, and a dismissal of the complaint, with costs.

All concurred, except WOODWARD, J., dissenting, in opinion.

WOODWARD, J. (dissenting).— If section 2653a of the Code of Civil Procedure is to have any intelligent and practical operation, there can be no question that this action was properly brought after the adjudication of the Surrogate's Court, and the

affirmance of the decree on the part of this court. (158 App. Div. 894.) The purpose of the statute was to permit interested parties to have a new trial of the issues before a jury, and it was competent for the parties to waive a jury and permit the court to determine the facts.

The learned trial court, in an opinion (88 Misc. Rep. 667), has reviewed the facts in this case, and we are persuaded that the appellant has failed to show a case demanding a reversal of the judgment. The will of 1910, previously admitted to probate, was revoked by the subsequent will of 1912, and no question is here presented but that this latter will was executed with all of the formalities required by law. It is urged, however, that the fact that the will was drawn by the plaintiff, who appears to have been a lawyer, and that it results in some advantage to himself, brings it within the rule laid down in *Matter of Smith* (95 N. Y. 516) and calls upon the plaintiff to establish affirmatively that the will was not the result of fraud or undue influence. But the rule as recognized in *Matter of Smith* does not go to the extent urged by the defendant, for it was said that the "rule to which we have adverted seems, however, to be confined to cases of contracts or gifts *inter vivos*, and does not apply in all its strictness at least, to gifts by will. It has been held that the fact that the beneficiary was the guardian, attorney, or trustee of the decedent, does not alone create a presumption against a testamentary gift, or that it was procured by undue influence." In the present case, while there is a suggestion that the plaintiff was a lawyer, it also appears that he was the husband of the testatrix, living with her at the time of the execution of the will. It appears likewise that he drew the will of 1910, and that he was beneficiary under that will, and that the testatrix had previous to the execution of the will of 1912 invited two of her neighbors in to witness the execution of a will which was to change the former one. No evidence whatever appears in the case which could justify the conclusion

that the testatrix was under any pressure at the time the will was executed, and unless this husband, acting to all appearances in a natural manner, is obliged to rebut a presumption of fraud from the mere fact that he was an attorney, there is no foundation for this appeal. We think there is no such burden imposed upon him by law; that fraud must be proved against him before he can be deprived of his rights. The mere fact of a man being an attorney does not outlaw him; he may still become the beneficiary of his wife's will, or of her failure to dispose of all of her property by a will, and, while the court would not fail to look into suspicious circumstances, and perhaps to hold a lawyer to a higher accountability than a layman under the same circumstances, we think in the case at bar the court has properly considered the facts, and that the conclusion is one justified by the record.

The opinion of the trial court makes it unnecessary to go further into the details of this case.

The judgment should be affirmed, with costs.

Judgment and order reversed on law and facts, with costs, and the complaint dismissed, with costs. The court disapproves of the fourth, fifth and seventh findings of fact and the first and second conclusions of law, and finds that the will of June 17, 1910, was the last will and testament of the testatrix and that the paper dated March 19, 1912, was not her last will and testament, and that the execution of said last paper was obtained by the husband, the party chiefly to be benefited thereby, by fraud practiced by him upon her and was not her free and voluntary act.

THOMAS F. NOLAN, Appellant, v. JOHN M. NOLAN and Others,
Respondents.

(*Supreme Court, Appellate Division, Third Department, July 1, 1915.*)

WILL—CONSTRUCTION.

A testator devised and bequeathed all of his estate to his wife to be used by her for the support and maintenance of herself and children so long as she remained his widow, but in case of her remarriage, the use and control of the estate was to pass to his son Thomas who was to support and provide for the children till the youngest became of age, subject to the right of dower. It was also provided that after the death of the wife or her remarriage, if such events should occur before the youngest child became of age, all the real estate and the remaining personal property should go to Thomas absolutely, subject to the support and maintenance of the children till they reached the age of twenty-one years. The testator died, survived by a widow and nine children, and leaving both real and personal property. The widow died without remarrying, after the youngest child had become of age.

Provisions of the will examined, and *held*, that the testator did not intend to give his property absolutely to his son Thomas, unless the wife should die or remarry before the youngest child became of age;

That the remaining property should be distributed share and share alike among the surviving children.

APPEAL by the plaintiff, Thomas F. Nolan, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Franklin on the 21st day of December, 1914, upon the decision of the court after a trial before the court without a jury, and also, as stated in the notice of appeal, from the decision upon which the judgment was entered.

John M. Cantwell, for the appellant.

George J. Moore, for the respondents.

Judgment affirmed on the opinion of VAN KIRK, J., at Trial Term.

All concurred.

The following is the opinion of the court below:

VAN KIRK, J.—Michael Nolan died December 18, 1890 (twenty-four years ago), leaving both real and personal property, and leaving him surviving nine children, one of whom is the plaintiff. Two sons, Patrick H. and Charles A., have died, no widow or child surviving either. Michael Nolan also left a widow, Catherine Nolan, who died on the 13th day of August, 1913. Catherine Nolan never remarried. At the time of his death Michael Nolan was living with his wife and children on his farm in Franklin county. From time to time a child has left home and some of them have always remained with the mother to the time of her death. Plaintiff, Thomas F. Nolan, was the eldest son after the death of Patrick. Thomas remained on the farm until about ten years ago with his mother and the other children, working the farm, the mother having the direction and the proceeds of the farm. At the time of Michael Nolan's death his youngest child was about two years of age and Thomas about seventeen.

The will of Michael Nolan was duly admitted to probate in Franklin county. The sole question is the construction of paragraphs 1 and 2 of the will. The two paragraphs are as follows:

"*First.* After the payment of all my just debts I give, devise and bequeath to my wife Catherine Nolan the use, benefit and control of all the real and personal estate of which I may die possessed, to be used by her for the support and maintenance of herself and our children, so long as she remains my widow. But in case of her marriage the use and control of the said real and personal estate shall pass from her to my son Thomas Nolan, who shall support and provide for my children till the youngest

child is of the age of twenty-one years, subject to the dower right of my wife or widow.

"*Second.* On and after the death of my wife or her marriage if such events should occur before my youngest living child is of age I give, devise and bequeath to my son Thomas Nolan all of my real estate and all that remains of my personal estate to be his absolutely, subject to the support and maintenance of such child or children till they reach the age of twenty-one years."

The question is whether or not the testator has disposed of the corpus of his estate, except in the events that his wife dies or remarries before the youngest child reaches the age of twenty-one years. There are two chief purposes expressed in the will: (1) To provide for the wife while she remains his widow; (2) to provide for his young children during minority. The 1st provision (1) gives to the wife the use and control of his property during life, if she does not remarry, or, as expressed, "so long as she remains my widow;" (2) in case his widow marries before the youngest child becomes of age, transfers the "use and control * * * from her to my son Thomas Nolan, who shall support and provide for my children till the youngest child is of the age of twenty-one years." In the 2nd provision he still has in mind the care of his minor children and he provides that if the widow dies or remarries before the youngest child reaches its majority, then the absolute title goes to Thomas, subject to the support of the children during their minority.

If the language used in a will has a clear meaning, it must be accepted as disclosing the intent, and this intent must be upheld if consistent with the rules of law; the court must not construe a will contrary to the ordinary meaning of the language used upon conjecture as to intent, or upon suspicion that the testator did not understand the expressions used. (*Tilden v. Green*, 130 N. Y. 29; 40 Cyc. 1402.) Courts may "insert

or leave out provisions, if necessary, but only in aid of the testator's intent and purpose never to devise a new scheme or make a new will.' " (Leggett v. Stevens, 185 N. Y. 70, 77.) The courts are to construe, not construct. We cannot assume that the testator and the one who drafted the will did not understand the ordinary meaning of the language used or that they were ignorant of the rules of property rights. They knew, for instance, that the widow's dower must be recognized and they are presumed to have known how testator's property undisposed or by will would descend and be distributed by statute among his children. (Adams v. Massey, 184 N. Y. 62, 69.) It is true that the law favors a construction of the will which would prevent partial intestacy (Schult v. Moll, 132 N. Y. 122; Vernon v. Vernon, 53 id. 361), but only when a contrary intention is not expressed. (Matter of Disney, 190 N. Y. 128.) In this will a contrary intention is expressed in simple language. There is another rule equally positive with the last: "The law favors equality among children in the distribution of estates; and in cases of doubtful construction it selects that which leads to such a result." (Stokes v. Weston, 142 N. Y. 433, 439.) The reasonable conclusion is that the testator did not intend to give his property absolutely to his son Thomas, unless the wife Catherine should die or remarry before the youngest child attained the age of twenty-one years. Under this construction, if the burden of caring for the minor children be cast upon Thomas, he shall have the farm and personal property; a reason would exist for discriminating in his favor as against the other children. On the other hand, if no such burden falls upon him, then the property is distributed share and share alike among the surviving children or their descendants.

I have not overlooked the skill of plaintiff's counsel in suggesting another construction of the will. He urges two changes to disclose the intent. He inserts a clause in parenthesis, so that the latter part of the 1st paragraph would read

as follows: "But in case of her marriage, the use and control of the said real and personal estate shall pass from her to my son Thomas (by and in the manner provided in the next paragraph), who shall support and provide for my children till the youngest child is of the age of twenty-one years." And in the 2d paragraph he strikes the letter "s" from "events," making it read, "On and after the death of my wife, or her marriage, if such event should occur before my youngest living child is of age, I give, devise and bequeath to my son Thomas Nolan all of my real estate and all that remains of my personal estate, to be his absolutely, subject to the support and maintenance of such child or children till they reach the age of twenty-one years." As to the change in the 1st paragraph, the plaintiff says the gift of the use and control was not an estate for life or part of his life, but was a reference to or anticipation of the absolute gift made in the 2d paragraph. By this contention the plaintiff seeks to avoid the inconsistency between the 1st and 2d paragraphs of the will, one giving the use and control to Thomas upon the happening of a certain event, and the other giving the absolute title upon the happening of the same event. By accepting this construction (and the language permits it) we arrive at the same result reached under the rule: where there is an irreconcilable inconsistency between two provisions of a will, effect will be given to the later in preference to the earlier clause, as being the latest expression of the testator's intention. (*Adams v. Massey*, 184 N. Y. 62; *Van Vechten v. Keator*, 63 id. 52.) But I do not think the change suggested in the 2d paragraph (striking out the "s") should be accepted. There is nothing in the will indicating an intention upon the part of the father to dispose of the corpus and to make a preference among his children, except upon the happening of the events named. The language is simple, its ordinary meaning clear, and we are not at liberty to assume he did not understand its meaning.

In considering this will, it must be remembered that it speaks as of the time of the testator's death, twenty-four years ago. What has happened since was necessarily unknown to him at the time. He did know that, if he died then, he would leave young children to be cared for; also his widow. While she remained his widow, he meant she should be cared for, and, while his children remained minors, he meant they should be cared for; and I can discover no reason existing at the time why that solicitous care he felt for his minor children should not extend to the distribution of his estate, except the one above mentioned. It is true that, if the widow remarried, or died, shortly before the youngest child became of age, the reward would seem large; but if Thomas was to enjoy the benefits provided for him under the will, he was restricted from other undertakings and occupations and must at all times hold himself in readiness to comply with the terms of the will. Thomas did remain on the farm and served his mother faithfully for thirteen years, till he was about thirty years of age. The court, therefore, if at liberty to make a fair distribution of the estate, would be inclined to make him some allowance for services, but the court must confine itself to construing the will; it cannot make a new will. The present will, construed as above, complies with the intent of one "desirous of making an equitable and proper disposition of my property at my decease." It provides for the support of his widow and minor children, and, as the events have occurred, leaves the remainder equally to his children, the natural objects of his bounty. This the law favors.

A decision may be prepared in compliance with the stipulation of the parties and with this memorandum.

In the Matter of Proving the Last Will and Testament of
URSULA A. KENT, Deceased.

BETSEY C. ADAMS, Contestant, Appellant; TRUST AND DEPOSIT
COMPANY OF ONONDAGA, as Executor, etc., of URSULA A.
KENT, Deceased, and Others, Respondents.

(*Supreme Court, Appellate Division, Fourth Department, October 6, 1915.*)

WILL—PROBATE—EVIDENCE AS TO CONTENTS OF PARAGRAPHS CUT FROM WILL
BY TESTATRIX—HEARSAY—RES GESTAE—WHEN SUBSEQUENT MOTION TO
STRIKE OUT INCOMPETENT EVIDENCE SHOULD BE GRANTED—ATTEMPTED CAN-
CELLATION OF PARTICULAR CLAUSES OF WILL—EFFECT OF FAILURE TO
ESTABLISH CONTENTS OF PORTION OF CLAUSES CUT FROM WILL.

Where in a proceeding for the probate of a will it appears that the testatrix during her lifetime had cut and completely removed a paragraph containing a money legacy, and also a part of the residuary clause, and that these portions of the will have not been found, evidence by a neighbor of the testatrix based upon a conversation with her about three months after the date of the will, as to the contents of the missing parts, is hearsay, incompetent and no part of the *res gestae*.

The fact that such testimony was not objected to when offered is no objection to a subsequent motion to strike it out, where it appears that the proponent of the will was in no way prejudiced by the delay, or that if the objection had been seasonably made it could have been at the time obviated, or other evidence produced to prove the contents of the missing parts.

Even if the testimony of the neighbor of the testatrix had been competent, it was insufficient to establish the contents of the missing clauses of the will, where the only other testimony was that of the attorney who drew the will, who could only remember that the one clause contained a money legacy for some amount "in the thousands" in favor of a certain beneficiary.

If, upon a new trial, which must be granted, the contents of the missing parts are established the will should be probated, including the missing parts; but if such parts are not established then the portion of the will which remains should be probated.

Since attempted cancellation of particular clauses of a will by their obliteration is ineffectual to revoke such clauses, the remaining portion of the will may be probated, even if the contents of the obliterated parts

cannot be ascertained, unless it can be seen that the missing parts will affect or alter the remaining parts.

If the contents of the portion of the residuary clause cut from the will in question cannot be ascertained, then there will be intestacy as to this portion of the residue, for a lapsed or ineffectual gift of a portion of the residue does not fall into or become a part of the remaining residue.

If the money legacy cut from the will fails because its amount and donee cannot be ascertained, such unknown amount will sink into the residue as in the case of a lapsed legacy.

ROBSON, J., dissented.

APPEAL by Betsey C. Adams, one of the heirs at law and next of kin of Ursula A. Kent, from a decree of the Surrogate's Court of the county of Onondaga, entered in the office of said Surrogate's Court on the 4th day of February, 1915, admitting to probate a paper propounded as the last will and testament of Ursula A. Kent, deceased, including missing parts thereof which the surrogate found had been cut from the will by the testatrix in her lifetime, without intent on her part to revoke the whole will, but only the parts so eliminated.

Daniel A. Pierce, for the appellant.

Joseph B. Murphy, for the respondents Ross King and others.

A. H. Cowie, for the respondent Trust and Deposit Company of Onondaga, as executor.

FOOTE, J.—On March 9, 1911, Ursula A. Kent made her last will and testament consisting of fourteen separately numbered paragraphs. A few days after her death on July 10, 1913, the will was found locked in the drawer of a bureau in what had been her sleeping room. It then appeared that the paragraph numbered 6th, and a part of the paragraph numbered 10th, being the residuary clause, had been cut and completely removed from the will.

The learned surrogate has found as a fact that those clauses if cut from the will by the testatrix in her lifetime was with the intention of revoking such clauses only and not of revoking the will as a whole. He has also found that the 6th clause contained a legacy of \$2,500 each to Ross L. King and Bruce L. King, and that the missing part of the 10th or residuary clause gave to each of these men one-fourth of the residue of her estate. He has held as matter of law that the cutting of these two clauses from the will did not effect their revocation, and he has admitted the will to probate, including the missing clauses, as he finds their contents to have been.

Betsey C. Adams, one of the heirs at law and next of kin of testatrix, filed exceptions to the surrogate's findings of fact as to the contents of the missing clauses, on the ground that there was no evidence to support such findings, and to the conclusions of law, and has appealed to this court both upon the law and the facts.

The missing parts cut from the will have not been found. Mr. Cook, the attorney who drew the will, could recollect that the missing 6th clause contained a money legacy for some amount in favor of Ross King and that its amount was "in the thousands;" further than this, he had no recollection as to the contents of the missing parts. The testimony upon which the learned surrogate based his finding as to the contents of these missing parts was given by Margaret Gibbs, who was housekeeper in a college fraternity chapter house next door to Mrs. Kent's residence. She had known Mrs. Kent for about six years and was on friendly terms with her. They saw each other frequently at one house or the other. Mrs. Gibbs testifies that about three months after the date of the will at Mrs. Kent's house Mrs. Kent told her that she had, by her will, left a legacy of \$2,500 to Ross King and the same amount to his brother, Bruce King, and they were to have one-fourth of what was left after the other legatees were paid. She also

testifies that there were several other similar conversations before Mrs. Kent's death in which Mrs. Kent made the same statement in substance.

No objection was made to this testimony by appellant's counsel at the time it was given, but at a subsequent hearing, before the submission of the case, a motion was made to strike it out as incompetent and no part of the *res gestae*. This motion the surrogate denied "for the present," with a statement that "Before disposing of the case or at the time of disposing of it, if I think it should be struck out, I may then do so." In his written opinion (89 Misc. Rep. 16) the surrogate holds that the objection to Mrs. Gibbs' testimony came too late and for that reason adhered to his ruling refusing to strike it out. On that testimony, with the testimony above referred to of Mr. Cook, he has based his findings as to the contents of the missing parts of the will.

The testimony of Mrs. Gibbs was clearly hearsay and incompetent. (Smith v. Keller, 205 N. Y. 39; Lippard v. Humphrey, 209 U. S. 264; Matter of Kennedy, 53 App. Div. 105; 167 N. Y. 163; Clark v. Turner, 50 Neb. 290; 38 L. R. A. 433 and note.)

If this testimony had been objected to when offered, it would have been the duty of the surrogate, in view of the above authorities, to sustain the objection and exclude the testimony. It is not claimed that the proponent of the will was in any way prejudiced by the delay in making the objection, or that if the objection had been seasonably made, it could have been at the time obviated or other evidence produced to prove the contents of the missing clauses of the will. Under these circumstances, we think the surrogate should have granted the motion to strike out Mrs. Gibbs' testimony. (Miller v. Montgomery, 78 N. Y. 282.)

We are also of opinion that the testimony of Mrs. Gibbs, if allowed to remain in the case, is not of sufficient probative

value to support the findings as to the contents of the missing clauses, and that the surrogate's findings of fact numbers 5 and 6 as to the contents of the missing clauses should be disapproved.

These conclusions will require a new trial where the contents of the parts excised from the will may be shown by competent evidence. In that case the will should be probated including the missing clauses as still a part of the will and unrevoked. (*Lovell v. Quitman*, 88 N. Y. 377, and cases collected in note to *Hartz v. Sobel*, 38 L. R. A. [N. S.] 797.) In case such evidence is not forthcoming, then we think that part of the will which remains should be probated.

The general form of the will is such that it is reasonably apparent that the missing 6th clause contained a money legacy, as did those which precede and follow it. The estate is large enough (over \$30,000) to pay all the legacies and leave more than one-half for the residuary. There is an imperative direction to convert the real property into money and it must be construed as a will of personalty. If the 6th clause fails, the only effect is to increase the residue. The part of the 10th or residuary clause which remains and was not cut out gives one-quarter of the residue to the Syracuse Home Association and one-quarter to the Onondaga County Orphan Asylum.

In jurisdictions where, like our own, attempted cancellation of particular clauses by their obliteration is ineffectual to revoke such clauses, the weight of authority seems to favor the probate of that part of the will which remains, even if the contents of the obliterated parts cannot be ascertained, unless it can be seen that the missing parts would affect or alter the remaining parts, while in jurisdictions where obliteration of a clause operates to revoke it, as in England, the remainder of the will stands exactly as if the revocation had been by codicil. (*Tarbell v. Forbes*, 177 Mass. 238; *Matter of Miles*, 68 Conn. 237; *Doherty v. Dwyer*, 25 L. R. Ir. 297; *Woodward v. Goul-*

stone, L. R. 11 App. Cas. [1886] 469; Matter of Patterson, 155 Cal. 626; 26 L. R. A. [N. S.] 654, and cases cited and reviewed in note.)

It is evident that one-half the residue was given by that part of the 10th clause which is missing. If its contents cannot be ascertained, then there will be intestacy as to this one-half of the residue, for a lapsed or ineffectual gift of a portion of the residue does not fall into or become a part of the remaining residue. (Kerr v. Dougherty, 79 N. Y. 327; Beekman v. Bonsor, 23 id. 298; Booth v. Baptist Church, 126 id. 215; Howland v. Clendenin, 134 id. 305.) It would seem, however, that if the legacy in the missing 6th clause fails because its amount and donee cannot be ascertained, the effect should be that its unknown amount would sink into the residue as in the case of a lapsed legacy. (Matter of King, 200 N. Y. 189; Langley v. Westchester Trust Co., 180 id. 326, and other cases cited in the valuable note to Galoway v. Darby, 44 L. R. A. [N. S.] 782.)

We should have no doubt of the application of the rule of these cases, prevailing as it does in England and most of our States, were it not for the recent decision in Osburn v. Rochester Trust & Safe Deposit Co. (209 N. Y. 54). The will in that case contained a general residuary clause. Some time after it was made the testatrix executed a codicil, by which she gave a legacy of \$1,000 to a church corporation not mentioned in her will. Before her death testatrix destroyed this codicil with intent to revoke it, but not to revoke the will. The principal question in the case considered in the opinion and in briefs of counsel was as to whether the destruction of the codicil *animo revocandi* revoked the will. It was held that it did not. But as to the effect of the codical and its revocation upon the residuary clause of the will it was said: "When the codicil modified the will by providing for an additional legacy before creation of the residuary estate it modified and revoked the will to that extent. This revocation was consummated at

the moment when the codicil was executed and published and thereafter the will was to that extent annulled. After this revocation had thus been consummated by the execution of the codicil the will could not be restored to its original form and tenor simply by the revocation of the codicil. A revocation of the revocation could not thus be accomplished. The effect of this is that the testatrix died intestate as to one thousand dollars."

It appears from the briefs of counsel that the attention of the court was not called to the numerous American and English cases and text books where the rule is stated to be in substance that a testator is presumed to intend a general residuary clause as a sort of a "catch all" to absorb all invalid, ineffectual or lapsed legacies or devises, and that legacies and devises are given away from the residuary legatee or devisee only for the benefit of the particular legatee or devisee named, failing which for any cause the intention is not intestacy but absorption into the residue. We quote from 1 Jarman on Wills (6th Am. ed.), *716: "A residuary gift of personal estate, carries not only everything not in terms disposed of, but everything that in the event turns out to be not well disposed of. A presumption arises for the residuary legatee against every one except the particular legatee: for a testator is supposed to give his personalty away from the former only for the sake of the latter." (See, also, 2 Redf. Wills [2d ed.], 116 *et seq.*; 1 Underhill Wills, §§ 335, 336; Cruikshank v. Home for the Friendless, 113 N. Y. 337; Matter of Bonnet, Id. 522.)

In the Cruikshank case the rule was applied although the devise which lapsed was one specially created by testator by a codicil which failed to take effect, and yet the lands so devised and so taken out of the residuary clause contained in the will were held to be restored to the residue.

It cannot be assumed that it was the intention of the court in the Osburn case to overrule the cases in this State above

referred to or that the court was not familiar with the rule of these cases. It may be difficult to reconcile that case on principle with the earlier cases. However that may be, we think the Osburn case is not controlling in our case. Here there was no codicil taking anything away from the residue created by the will. The testatrix's intention to dispose of some part of her estate by the 6th clause of her will fails simply because her intention in that respect cannot now be ascertained. If the legatee named in that clause had died before the testatrix, the amount of her intended legacy would fall into the residue in accordance with her presumed intention. If the legacy cannot be paid because its purport cannot be ascertained, we think we must presume the same intention in respect of the residuary clause, and so that its amount, whatever it was, falls into the residue, of which one-half will be distributed to residuary legatees whose names still remain in the will. As to the other one-half, unless the missing part of the residuary clause is proved, there will necessarily be intestacy.

The decree of the Surrogate's Court should be reversed, and as this proceeding was pending prior to the enactment of chapter 443 of the Laws of 1914, amending the Code of Civil Procedure as to the practice in Surrogate's Court, we are required by section 2771 of the Code, as enacted by that act, to follow the practice as it existed prior to September 1, 1914. Hence, under the provisions of section 2588 of the Code as it existed before the amendments of 1914, we must direct a trial by jury of questions of fact arising upon the issues between the parties. Accordingly, the decree of the surrogate is reversed, with costs to the appellant to abide the final award of costs, and a trial by jury is ordered to take place at a Trial Term of the Supreme Court in Onondaga county to be specified in the order of the following questions of fact:

1. Did the will propounded for probate at the time it was

executed contain clauses or provisions additional to those now appearing therein?

2. What was the contents of such additional clauses or provisions?

3. Were such additional clauses or provisions cut or removed from the will by testatrix, or by any other person in her presence by her direction or consent, for the purpose or with the intent to revoke the will?

All concurred, except ROBSON, J., who dissented.

Decree reversed, with costs to appellant to abide the final award of costs; the 5th and 6th findings of fact contained in the decision are disapproved and a trial of the following issues of fact directed to be had, by and before a jury of the Supreme Court, at a term thereof to be convened at the city of Syracuse, in and for the county of Onondaga, on the first Monday in November, 1915, viz.: 1. Did the will propounded for probate at the time it was executed contain clauses or provisions additional to those now appearing therein? 2. What was the contents of such additional clauses or provisions? 3. Were such additional clauses or provisions cut or removed from the will by testatrix, or by any other person in her presence by her direction or consent, for the purpose or with the intent to revoke the will?

THOMAS C. KELLOGG, as Administrator with the Will Annexed of the Estate of DANIEL KELLOGG, Deceased, Respondent, v. JOHN L. KELLOGG, as Administrator de Bonis Non of the Goods, Chattels and Credits of PAULINA W. KELLOGG, Deceased, Appellant.

(*Supreme Court, Appellate Division, Fourth Department, October 13, 1915.*)

EQUITY—EXECUTORS AND ADMINISTRATORS—SUIT FOR ACCOUNTING—DEFENSE—LACHES—WHEN LACHES AVAILABLE AS A DEFENSE, ALTHOUGH NOT SPECIFICALLY PLEADED—STATUTE OF LIMITATIONS—TRUST.

When parties have slept upon their rights for so long a time as to render uncertain the equity of the result sought, and by reason of the death of witnesses and parties it is extremely difficult to determine the actual facts, equity should deny relief.

Hence, where in a suit for an accounting upon the theory that the defendant's intestate died seized of certain property belonging to the estate of plaintiff's testator, which property in whole or in part, or the proceeds of same, are now in the possession of the defendant, it appears that plaintiff's testator died in 1836, leaving a large estate which has never been judicially settled; that involved with this estate is the estate of the brother of the wife of plaintiff's testator, who died in 1824, leaving a will in which he named plaintiff's testator as executor; that the transactions complained of and alleged to have been fraudulent began in the early fifties and were continued for the next thirty years; that with constant means at hand of compelling an adjustment of the estate, and with attention directly and publicly drawn by litigations and public records to improvident management of the estate and to the insolvency of its executors, no effort was made to liquidate the estate until the commencement of this suit in 1912, the complaint should be dismissed upon the ground of laches.

Since laches necessarily appeared from the proof of the plaintiff's acts it is immaterial that it was not specifically pleaded as a defense.

The six years' Statute of Limitations applies where a trust arises by reason of the wrongdoing of the person against whom it is asserted, whether the trust is sought to be enforced at law, in equity, or in the Surrogate's Court.

Neither the plaintiff in this suit nor his predecessors in trust owed an active duty to discover the fraud alleged, but knowledge of the facts from which such an inference might have been drawn was sufficient to start the operation of the statute.

APPEAL by the defendant, John L. Kellogg, as administrator, etc., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga on the 8th day of August, 1914, upon the report of a referee appointed to hear and determine the issues.

John D. Teller, Thomas M. Hunt, Ceylon H. Lewis and Frank E. Stone, for the appellant.

Charles W. Andrews and George Barrow, for the respondent.

LAMBERT, J.—This action is for accounting, upon the theory that Paulina W. Kellogg, the defendant's intestate, died seized of certain properties belonging to the estate of Daniel Kellogg, plaintiff's testator, which properties, in whole or in part, or the proceeds of same, are now in the possession of defendant.

Daniel Kellogg, plaintiff's testator, died May 4, 1836, and was survived by four sons and three daughters, and by his wife, Laura Kellogg.

He left a will, of which he appointed his son, John Kellogg, George F. Leitch and David A. Comstock as executors.

For a time the executor George F. Leitch seems to have been in active charge of the estate. Eventually, however, his health having failed, and Comstock having removed to New York, the active management of the estate devolved upon the son John. Finally both Leitch and Comstock having died, John Kellogg continued to act as sole executor until his death, February 7, 1883.

Following the decease of John Kellogg, one D. Kellogg Leitch was appointed administrator of the estate with the will annexed, and served in that capacity until his death, May 29, 1891.

Daniel Kellogg, a son of the testator, was next appointed administrator of the estate and served until his death, July 21, 1892, at which time plaintiff was appointed as such.

There has never been any judicial settlement of this estate.

John Kellogg was survived by his wife, Paulina, who died December 20, 1908, intestate. George B. Longstreet was appointed administrator of her estate, and acted as such until the completion of the trial and submission of this case, when he died, and the defendant was appointed administrator, substituted in the action, and continued the same in his name.

The Daniel Kellogg estate, in gross, amounted to several hundreds of thousands of dollars. Each of the children of the testator participated therein. John, the executor, received a \$28,000 bequest, and was also named as one of the residuary legatees.

Twenty-four thousand dollars was given to the executors in trust to pay the income to the daughter, Mary Ann Converse, with the remainder to her children.

Twenty-five thousand dollars in like manner was bequeathed in trust for the benefit of the daughter, Sally Maria Kellogg, with the remainder to her children.

In like manner \$25,000 was bequeathed in trust for the daughter, Catherine K. Leitch, with the remainder to her children.

April 26, 1912, the plaintiff filed a claim for \$75,000 against the defendant estate, founded upon the facts upon which judgment has been rendered. That claim was rejected May 14, 1912, and this action was brought August 31, 1912.

Pending the determination of the action, plaintiff's application to amend the complaint by increasing the demand for judgment was granted, and judgment for the plaintiff for \$236,089.12 has been rendered.

Interwoven with the Daniel Kellogg estate is the estate of one David Hyde, in connection with which latter estate arise many of the matters affording claimed support for the judgment appealed from.

David Hyde was a brother of the wife of Daniel Kellogg.

He died in 1824, leaving a will, in which he named Daniel Kellogg as executor. That will created a trust in the executor as trustee for the benefit of a daughter, Chloe Hyde, during her minority, the remainder then to be paid to her, or, under certain contingencies, \$10,000 of it to be paid to the Theological Seminary at Auburn, N. Y.

Chloe Hyde was taken into the family of Daniel Kellogg during her minority. She was residing there at the time of her majority in August, 1837, and continued her residence at that home until her death, May 31, 1850. She died intestate and without issue, and there has never been any judicial settlement of her estate.

In 1848 it appears that George F. Leitch, one of the executors of Daniel Kellogg's will, was largely indebted to the Kellogg estate, and that Daniel Kellogg's estate was largely indebted to either the estate of David Hyde or to Chloe Hyde, under the trust created by David Hyde's will.

In August, 1848, at the solicitation of John Kellogg, Leitch executed a conveyance to Chloe Hyde of various real property in Auburn and in Syracuse, by deeds which expressed a consideration of \$21,000 for the Auburn property and \$26,000 for the Syracuse property, aggregating some \$47,000. The referee has found that Chloe Hyde was induced to accept that conveyance as a payment upon the bequest owing her by the Daniel Kellogg estate, by reason of the representations of John Kellogg that it was advantageous, inasmuch as the indebtedness was in jeopardy. It is further found that she believed these lands to be clear of incumbrances; that she accepted the conveyance and gave her receipt to John Kellogg as executor for \$47,000 on account of the legacy to her under her father's will.

It is further found that these lands unincumbered were scarcely worth \$47,000; that in fact they were then incumbered for more than half of their actual value.

Upon the death of Chloe Hyde, and on May 29, 1851, letters

of administration upon her estate were granted to one Almeron H. Cole, who acted in that capacity until October 14, 1859, when he died, and Dan H. Cole was appointed in his stead.

Among the heirs at law of Chloe Hyde was one Christina Beach, who, in 1851, conveyed to Almeron H. Cole all her claimed one-fourth interest in the real and personal estate of Chloe Hyde, including the Syracuse and Auburn lands conveyed by Leitch.

Among the lands conveyed to Chloe Hyde by Leitch in Syracuse was a property known as the Exchange Building. This property was incumbered by a mortgage theretofore given by Leitch, and in August, 1850, that mortgage was placed in foreclosure judgment, the lands were sold and were bid in by Almeron Cole for \$10,200, the moneys for which were furnished by the executors of the Daniel Kellogg estate from that estate.

It is also found that at that time the executors of Daniel Kellogg held a second mortgage on this property for some \$20,000, which mortgage had been sometime theretofore given to Leitch and assigned by him to the executors.

At about the same time a mortgage prior to the Leitch title upon other Syracuse property, known as the Bradley house and lot (also a portion of the lands conveyed by Leitch to Chloe Hyde) was foreclosed, and this title was bid in by Almeron Cole for \$1,255.72, which moneys were also furnished by the executors of Daniel Kellogg, and upon this property such executors likewise held a second mortgage.

September 15, 1851, at which time Leitch and Comstock had ceased active management of the Daniel Kellogg estate, John Kellogg, as executor, entered into a written agreement with Almeron Cole, as administrator of the Chloe Hyde estate, to the effect that the Daniel Kellogg estate should bid in and assign to Cole, as such administrator, all the claims against the title conveyed by Leitch to Chloe Hyde which were outstanding at the time of that conveyance, and should satisfy all

claims of the Kellogg estate against Cole as administrator and against such real property. And Cole agreed that, in consideration therefor, the receipt theretofore given by Chloe Hyde for \$47,000 should stand as a valid receipt for that amount on account of the legacy to her under her father's will.

Eventually this contract was fully performed, at an expense to the estate of over \$34,000. This adjustment also satisfied all claim of the estate of Daniel Kellogg for moneys advanced to Cole with which to make the purchases in the two mortgage foreclosures above referred to.

January 1, 1852, John Kellogg, as executor, and Almeron H. Cole, as administrator of Chloe Hyde's estate, entered into a contract, specifying and extinguishing various claims, and fixing and determining the balance due to the Chloe Hyde estate from the Kellogg estate at the sum of \$50,000, with interest from November 1, 1851. It was distinctly provided that this contract did not abrogate or affect the preceding contract of September 15, 1851.

It seems that Cole never applied any of the real estate conveyed by Leitch to the liquidation of the Chloe Hyde estate. Instead of so doing he entered into two certain contracts with Paulina W. Kellogg (wife of John, the executor), first transferring to her a third of one-fourth of certain interests in such real property, and next, agreeing that she should receive eleven twenty-fourths of the net proceeds of the real estate so transferred.

It was further agreed between Cole, as administrator, and Paulina Kellogg that in their final adjustment any balance remaining due to the Chloe Hyde estate from the Daniel Kellogg estate should be deducted from Paulina's share in the net proceeds under such contract.

The daughter, Mary Ann Converse, having died, her administrator, in July, 1848, brought an action against the executors

of Daniel Kellogg's will for an accounting of the trust created for her benefit by that will. In that action it was made to appear that all the executors of the Daniel Kellogg estate were insolvent, and one Elias W. Leavenworth was appointed receiver of the Kellogg estate, and the entire remaining estate transferred to him.

Some adjustment of this situation was reached, for on July 1, 1851, the plaintiff having released all claim against the estate of Daniel Kellogg, the receiver was discharged and the estate reconveyed to the executors, except as to a judgment against the executor Leitch, as to which judgment the receivership was continued.

December 4, 1861, the daughter, Catherine Leitch, having died, her estate brought an action against John and Paulina Kellogg in connection with the trust created for this daughter's benefit under the Daniel Kellogg will, seeking to have adjudged as fraudulent and void a transfer of certain bank stock from John to Paulina, his wife. Such bank stock it was alleged was a portion of the trust estate created for the benefit of the plaintiff. In that action it appeared that on June 2, 1858, John had assigned to Paulina this bank stock. It was made to appear that, except for a payment of \$7,000 by way of the conveyance of real estate, and the further payment of \$1,750, both on account of income of the trust estate, John, the executor, had converted the balance of the income of this trust fund.

This action resulted in judgment in favor of the plaintiff, which decreed the transfer of these stocks as fraudulent and void.

In March, 1856, the Theological Seminary of Auburn brought action against the Daniel Kellogg estate and the Chloe Hyde estate for accounting under the trust created by the will of David Hyde. The action resulted in a judgment for some \$14,611.74 against both estates. That judgment was paid, one-

half by each estate, and the judgment was assigned to Paulina Kellogg.

In March, 1852, Almeron Cole, as administrator of the Chloe Hyde estate, for the consideration of \$5,333.33, transferred to Paulina Kellogg one-third of what he had received by virtue of the conveyance from Christiana Beach.

About 1868 partition was brought among the heirs of Chloe Hyde on the lands in Auburn which had been conveyed by Leitch. Out of the proceeds received by Cole in that action, and as a result of it, Paulina Kellogg was paid by Cole some \$9,250.39.

In 1869, following foreclosure of mortgages covering portions of the Syracuse lands, which lands were bid in by Dan H. Cole as a substituted administrator of the Chloe Hyde estate for \$14,254, by arrangement between Dan H. Cole and Paulina Kellogg, Paulina was paid and received \$4,583.33.

In November, 1869, a formal written agreement was entered into between Paulina Kellogg, by John, her husband, as her attorney, upon the one part, and Dan H. Cole, individually and as administrator of the Almeron Cole estate, upon the other, reciting the various contracts between Almeron Cole and Paulina Kellogg, and acknowledging receipt by Paulina of \$9,250.39 out of the mortgages upon the properties conveyed by Leitch, which had been enforced, and adjusting Paulina's share in the other mortgages at \$4,583.33. This contract adjusted all of the claims under such various contracts, with the exception of the Bradley lot. Later, and in July, 1876, Paulina received from other sources the further sum of \$1,604.13.

Some time subsequent to March 1, 1852, the executors of the Daniel Kellogg estate conveyed to Almeron Cole, as administrator of the Chloe Hyde estate, three parcels of land, at a consideration of \$12,000, to apply on the Chloe Hyde estate claim. In that connection Paulina Kellogg agreed with Cole

to thereafter repurchase same from Cole, if she was so requested, at the same price, plus interest. In July, 1860, Paulina Kellogg and John Kellogg, upon the one part, and Dan H. Cole, as administrator of Almeron Cole, and as administrator of Chloe Hyde, entered into a formal written contract, adjusting and finally settling and acknowledging satisfaction in full of the Chloe Hyde claim against the Daniel Kellogg estate.

Another phase of the litigation upon which recovery has been allowed grows out of the Horace White mortgages and involves the following facts:

Horace White was the owner of two prior mortgages upon a portion of the Syracuse land conveyed by Leitch to Chloe Hyde. He began foreclosure upon both such mortgages. Judgment on the first mortgage was rendered in June, 1850, and upon the second mortgage in March, 1851. The premises were sold on the second judgment and were bought in by Leavenworth, the receiver, who conveyed twenty-five feet therefrom to one Raynor, and White released that strip from his first foreclosure judgment.

The balance of these lands was conveyed back to Daniel Kellogg's executors by Leavenworth upon the termination of the receivership, still subject to White's first foreclosure judgment. Horace White never enforced that judgment, and he died in 1859.

White's executor in October, 1869, assigned the first mortgage, which afforded the basis for the first foreclosure judgment, to Paulina Kellogg by written assignment without recourse. That assignment was never recorded.

In November, 1869, the sheriff sold these remaining lands on the first White foreclosure judgment and Paulina bought them in for \$5,436, receipting to the sheriff on account of such sale for that sum.

In the interim following the conveyance from Leavenworth, the receiver, to the Daniel Kellogg executors these lands were

in the possession of the Daniel Kellogg executors; that is, of John Kellogg, the active executor. Their management was intrusted to one Merriman. Following the sale to Paulina by the sheriff there was no actual change of possession, and in fact none until some time later, when Paulina conveyed to various parties.

Paulina Kellogg received from this property so purchased, through various sales thereof, a large amount of money.

Some \$9,500 of this money, together with \$5,500 of money borrowed by Paulina, was taken by John and invested in bank drafts and used in the purchase of timber lands in Wisconsin, title to which was taken in the name of Paulina Kellogg in October, 1882. Eventually she sold these lands for \$100,000, an advance of \$85,000, a large portion of which profit the referee finds is now in the hands of the defendant.

The referee has also found that other lands out of the Leavenworth conveyance were conveyed by Dan H. Cole, as administrator of both the Almeron Cole and the Chloe Hyde estates, to Paulina Kellogg in 1873, and were resold by her at a profit, and that bonds and mortgages which were assigned by John Kellogg, as executor, to Almeron Cole, aggregating over \$3,000, were soon thereafter assigned by Cole to Paulina Kellogg.

Another phase of the litigation, in which claimed support lies for a portion of the recovery, arises out of the following facts:

In January, 1853, one White and one Davis were the owners of a farm tract in Syracuse, which they then conveyed to Paulina Kellogg for the consideration of \$2,000. Paulina conveyed these premises to Merriman, who cut them up into lots and sold them. Merriman and Paulina were to share equally in the profits of these lands. Paulina received from this source, as her share of such profits, over \$9,000.

This farm was subject to a judgment lien in favor of the

Daniel Kellogg estate, which lien was not asserted, but was allowed to outlaw.

It appears that upon each of the successive appointments of a representative of the Daniel Kellogg estate, each new representative engaged an attorney to investigate the status of the estate and the details thereof, and that each such attorney did so investigate.

It is found that Paulina Kellogg received from her father's estate only about \$7,000; that John Kellogg was engaged in no business after 1850, except that for about a year or two about the year 1860 he was a broker in New York City; that he left New York about 1864 bankrupt.

It also appears that Paulina W. Kellogg left a personal estate of over \$70,000.

As a conclusion of fact to be drawn from the various records and documents in evidence the referee has determined that John Kellogg was familiar with and knew of all the dealings between Cole and Paulina Kellogg.

Upon such facts (greatly amplified in detail) the referee has found a continuing trust to have existed in John Kellogg, as representing the Daniel Kellogg estate; that Paulina Kellogg, his wife, with his knowledge and active co-operation, took unto herself by the means above indicated large portions of the estate of Daniel Kellogg without consideration or for grossly inadequate consideration. From such situation he reasons that a continuing trust arose in Paulina W. Kellogg, who held such properties and the avails and profits thereof as a trustee for the benefit of the Daniel Kellogg estate.

The referee has further concluded that no knowledge of such fraud, actual or constructive, is to be charged against any of the representatives of the Daniel Kellogg estate, following the death of John Kellogg, until within less than six years prior to the commencement of this action, and that hence no Statute of Limitations has run as against this action.

The referee has awarded judgment upon three classes of matters, as follows:

First. For the profits and interest thereon, accruing to Paulina through her dealing with Almeron Cole, in connection with sums paid by him to her under the various contracts between them, and finding their inception in moneys or property of the Daniel Kellogg estate.

Second. For such proportion of the profits of the Wisconsin timber lands as \$9,500 bears to \$15,000, it being held that the \$9,500 which went into that purchase in equity belonged to the Daniel Kellogg estate, having been realized through the sale by Paulina of the title she purchased under the first White foreclosure judgment, under the circumstances above indicated; and

Third. For the profits and interest arising out of the sale of the farm tract conveyed to Paulina by White and Davis and resold by her to Merriman and upon which a judgment lien in favor of the Daniel Kellogg estate was permitted to lapse and outlaw.

While we have concluded that the findings of fraud made by the referee are not sufficiently supported by the evidence and have reversed such findings, yet if we be wrong in that conclusion still this judgment must be reversed.

The defendant has asserted the Statute of Limitations as a defense to this action. In opposition to its application it is argued that the relation of John Kellogg to the Daniel Kellogg estate was one of such trust and confidence that a continuing trust arose as to him in favor of those entitled to the estate of such a character that no lapse of time would preclude a compulsory accounting against him until he had openly disavowed that trust and repudiated his responsibility thereunder. The argument is then carried further, that by reason of the close relationship between John and his wife, Paulina, and the man-

ner in which these various properties were transferred from the Daniel Kellogg estate to Paulina, Paulina merely assumed the same position which John had held with reference to the Daniel Kellogg estate, and took and retained those properties, not as an individual, but in trust and as a continuation of the trust in John, subject to the same disabilities and obligations as was he. It is then urged that no Statute of Limitations would start running in favor of Paulina until she, in turn, had openly disavowed her obligation in such trust.

That an executor occupies a trust relation toward those entitled to the estate, irrespective of the provisions of the will, and that no Statute of Limitations commences to run in favor of such executor, until disavowed of the trust by him, seems settled. (Matter of Meyer, 98 App. Div. 7.)

There is no doubt but that, assuming the fraud to be established, Paulina may be charged as a trustee by reason of her wrongdoing, and under such circumstances she would be what is ordinarily described as a constructive trustee. (Lightfoot v. Davis, 198 N. Y. 261.)

There seems little doubt of the application of the six years' statute to those cases where a trust arises by reason of the wrongdoing of the person against whom it is asserted. (Code Civ. Proc., § 382, subd. 5; Lightfoot v. Davis, *supra*.)

And such a statute seems to have application whether the trust is sought to be enforced at law, in equity or in Surrogate's Court. (Matter of Rogers, 153 N. Y. 322.)

In avoidance of the six years' Statute of Limitations the referee has found that the fraud which forms the entire support for the action was not discovered by the plaintiff or his predecessors until within six years immediately preceding the bringing of this action. Such finding of non-discovery has no basis in direct evidence. It is an inference sought to be drawn from the entire circumstances of the case.

Of course neither the plaintiff nor his predecessors in this

trust owed an active duty to discover this fraud. (*Baker v. Lever*, 67 N. Y. 304; *Spallholz v. Sheldon*, 148 App. Div. 573.) But with knowledge of the facts from which the inference is to be drawn, such knowledge is sufficient to start the operation of the statute, and it is no answer to say that the inference was not suggested or in fact drawn.

As was said in *Higgins v. Crouse* (147 N. Y. 415): "Fraud lies in the intent to deceive, but the mental emotion is inferred from the facts which indicate it, and it is with those facts and the inferences to which they lead that the law necessarily deals. When, therefore, facts are known from which the inference of fraud follows, there is a discovery of the facts constituting the fraud, * * * within the precise terms of the statute. That the defrauded party did not actually draw the inference, but shut his eyes to it, does not stop the running of the statute. He ought to have known, and so is presumed to have known, the fraud perpetrated. But a case may arise where he knows none of the facts, where no circumstance has occurred calculated to arouse his suspicion or disturb his confidence or suggest the need of inquiry."

It seems incredible that there was no discovery of the facts now claimed to indicate fraud, throughout the many years that have elapsed since the transactions now complained of.

The various transfers of real property were of course matters of common knowledge and largely the subject of public record. The various litigations, brought to light, were also matters of public record, and their probative force to-day is no greater than years ago.

The transactions complained of begin in the early fifties and were included within the next thirty years. John Kellogg died in 1883, and throughout the many years since that time many, if not all, the salient facts in this case must have been known. No effort to assert them seems to have been made, either during the many years that John was living after the

acts complained of, nor during the long period which his wife, Paulina, survived him.

Under such circumstances, we do not deem the conclusion of the referee as to non-discovery of the fraud to be well founded, resting, as it does, entirely in circumstantial evidence.

Since the death of John, three representatives of the Daniel Kellogg estate have been appointed, and hence three separate investigations of the estate have been made, and the more reasonable inference from the entire situation seems to be that the facts now urged to support the findings of fraud were discovered in the main by each of the three representatives.

Under such circumstances, the six years' Statute of Limitations is clearly applicable, if the trust claimed to exist in Paulina was in fact a constructive trust, arising from her wrongdoing.

But if the argument of the respondent is to prevail, and the trust asserted to exist in Paulina be more than a constructive trust, and be regarded as a continuation of the trust in John, and if it can be said that no Statute of Limitations could become applicable in favor of Paulina until an open disavowal of the trust by her; and if it could be further said that there has been no such open disavowal, and that her ownership of these various properties throughout all these years was not such a disavowal as to start the running of the statute, still the plaintiff must be denied relief on account of the staleness of the claim now asserted.

This action is in equity, where the parties have come to have equity done them. The powers of a court in equity, in furtherance of an equitable result, are and should be generously exerted. However, it should be certain that the result sought is equitable. When the parties have slept upon their rights for so long a time as to render uncertain the equity of the result sought, and by reason of the death of witnesses and parties, it is extremely difficult to determine the actual

facts, equity should deny relief. This, lest in the exercise of its great powers it reach a wrong result, because of the uncertainty of the facts with which it attempts to deal.

Such a situation seems to be presented by this case. The Daniel Kellogg estate, large in amount and complicated in its entirety, arose in 1836 upon the death of the testator. Interwoven with it, in such a manner as to afford many of the claimed grounds for relief, was the estate of David Hyde, which came into being in 1824.

With a constant means at hand of compelling an adjustment of this Daniel Kellogg estate, and with attention directly and publicly drawn by litigations and public records to improvident management of the estate, and to the insolvency of its executors, no effort seems to have been made to liquidate the estate and determine it throughout the many years that have elapsed since accurate proof of the facts was available. Witnesses are now dead, as well as parties, so that we are now practically without proof, except such as may be gleaned from ancient records, documents, etc. Under such circumstances, the court is asked to determine large property interests, the ownership of which rests upon facts now almost incapable of proof. Inferences which may now be drawn from cold and scant records of years ago are likely to be far different than inferences to be drawn from the same records, supplemented by other important but unrecorded facts, and no court is in a situation now well to judge the real purposes of John and Paulina Kellogg which pervaded the transactions under inquiry.

As was said in *Calhoun v. Millard* (121 N. Y. 81): "It is and always has been the practice of courts of equity to remain inactive where a party seeking their interference has been guilty of unreasonable laches in making his application. (Story's Eq. Jur., § 2520.*)" The principle is stated with

* See 13th ed.—[R.E.P.]

great force and clearness by Lord CAMDEN in *Smith v. Clay* (2 Ambl. 645): 'Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are discountenanced and, therefore, from the beginning of this court, there was always a limitation to suits in this court.' "

In *McKechnie v. McKechnie* (3 App. Div. 91) the Appellate Division in this department applied the rule of laches to an action brought to redeem a mortgage, where it appeared that the transaction occurred some thirty-three years before the trial, and that nearly all the actors in the transaction at the time the cause of action arose had died.

This court likewise followed the same rule in *McCartney v. Titsworth* (119 App. Div. 547), there saying: "It may further be suggested that the claim of equitable title is a stale one which a court of equity would hardly aid the defendant to establish. The deed to the wife was given and title has been held by her thirty-eight years before her death, and it was more than four years after her death that the claim was first made by the defendant in this action. (See *McKechnie v. McKechnie*, 3 App. Div. 91; *Town of Mount Morris v. King*, 8 id. 495, 499, 500; *affd.*, sub nom. *Town of Mount Morris v. Thomas*, 158 N. Y. 450, 456, 457; *Hutchinson v. Hutchinson*, 84 Hun, 482, 487.)"

In *Matter of Neilley* (95 N. Y. 382) the court took occasion to say: "But assuming that the case was one solely of equitable cognizance and that, for any reason, the statute afforded no protection, it is the law of courts of equity, independent of positive legislative limitations, that they will not entertain stale demands."

The same rule was early recognized by the Court of Chancery in this State in *Ellison v. Moffatt* (1 Johns. Ch. 46).

It is suggested that the defense of laches is not available, inasmuch as it was not specifically plead.

This is not controlling. In equity it is the general rule, “ ‘that the relief to be administered will be adapted to the exigencies of the case as they exist at the close of the trial.’ ” (Lightfoot v. Davis, *supra*.)

It is also true that the defendant throughout the trial did assert the staleness of the claims of plaintiff, although basing his claim more particularly upon the Statute of Limitations than upon the general doctrine of laches. The laches necessarily appears upon the proof of plaintiff's case and may be availed of by the court in the final relief to be decreed.

It thus appears that if by reason of fraud a constructive trust arose in Paulina Kellogg, this action is barred by the six years' Statute of Limitations. On the other hand, if the trust was a continued trust and a mere extension of that in John, so that no Statute of Limitations has run, then relief should be denied plaintiff by reason of the staleness of the claim and the uncertainty of the facts upon which relief must be predicated.

Under such circumstances, not only must the order and judgment appealed from be reversed, but the complaint should be dismissed.

All concurred.

Judgment reserved upon questions of law and fact, and complaint dismissed, with costs, including costs of this appeal. Order granting additional allowance reversed. Order to be settled before Mr. Justice LAMBERT on five days' notice, at which time shall be submitted proposed additional findings to be made by this court and a memorandum of the findings of the trial court to be disapproved.

JOHN H. SIEMERS, Respondent, v. ADON MORRIS and Others,
Appellants, Impleaded with JOHN MCQUEEN and ALMEDIA
MCQUEEN, as Trustees of the Estate of JOHN MCQUEEN,
Deceased, Defendants.

(*Supreme Court, Appellate Division, Third Department, September 15,
1915.*)

**WILL—TRUST—PROVISION THAT ESTATE SHALL BE FREE FROM CLAIMS OF
BENEFICIARY'S CREDITORS.**

A testamentary provision that no part of a trust estate for the maintenance and support of the testator's son "shall go to or be had by, or be obtained in any manner by any creditor" of the said beneficiary, is valid although it is provided that the beneficiary is entitled to have the corpus of the estate transferred to him when he shall "become free and discharged from all his debts, judgments, claims and demands against him."

Hence, a judgment creditor of said beneficiary is not entitled to maintain an action to have the trust adjudged invalid as to creditors and to charge the estate with the payment of his judgment.

APPEAL by the defendants, Adon Morris and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Madison on the 16th day of October, 1913, upon the decision of the court after a trial at the Madison Special Term.

Brown & Woolver (R. H. Woolver of counsel), for the appellants.

George E. Philo (James E. Brewer of counsel), for the respondent.

LYON, J.—The single question for determination upon this appeal is as to the validity of a trust created by the will of Laura A. Morris, deceased, the relevant portions of which are as follows:

"*Second.* I give, devise and bequeath, to my daughter-in-law, Lizzie Morris, all of my estate, both real and personal, of every name and nature, in trust, for the purpose hereinafter declared.

"*Third.* I direct that she keep the real estate and all the personal property, invested in good securities, and apply such portion of the income of the estate from time to time as her judgment may deem necessary for the maintenance and support of my son, Adon Morris, and his family as long as my son may live, (unless my property is sooner exhausted). And at the death of my son, Adon S. Morris, I direct that my property (or so much thereof as may be left) after supporting my son, Adon S. Morris, shall be divided equally or in equal proportions, to share and share alike to my son's, Adon S. Morris' children.

"*Fourth.* I hereby express and emphatically declare that no part of my estate, so given in trust to Lizzie Morris, for the maintenance and support of my son, Adon S. Morris, shall go to or be had by, or be obtained in any manner by any creditor of the said Adon S. Morris.

"*Fifth.* I further order and direct, that in the event, or in case that my son, Adon S. Morris, shall at any time during his lifetime, become free and discharged from all his debts, judgments, claims and demands against him, that then and in that case, the said Lizzie Morris shall on request of my said son, Adon S. Morris, and without unnecessary delay, deed, transfer, and deliver and pay over to my son, Adon S. Morris, all of my estate so entrusted and remaining in her hands, and the same shall be received by my son, Adon S. Morris, and thereafter become his absolute property, to be had, used and controlled by him, and trusteeship of the said Lizzie Morris shall thereupon cease."

The plaintiff is a judgment creditor of Adon S. Morris, and by this action seeks to have the attempted trust adjudged

invalid as to creditors, and the real estate of Laura A. Morris, deceased, charged with the payment of the judgment. The learned trial court held, relying upon the case of *Ullman v. Cameron* (186 N. Y. 339), that the trust attempted to be created was invalid; that Adon S. Morris took an estate in fee absolute in the real estate of the testatrix, and directed that the real estate be sold under said judgment. From the judgment entered upon such decision this appeal has been taken.

We think the decision in *Ullman v. Cameron* is not applicable. In that case the will, after directing the payment by the executor to the husband of the testatrix of the income of the estate and of so much of the principal as might be necessary for his support and maintenance during the term of his natural life, provided, "*Third*. I further will and direct that whenever the said Charles E. Cameron shall desire to engage in any business or enterprise and shall give notice thus to the said Albert L. Cameron that he desires the whole or any part of such principal sum for such purpose it is my will, and in that case I hereby direct the said Albert L. Cameron to pay over and deliver to the said Charles E. Cameron the amount so desired by him out of the principal sum so given to him in trust by the first clause hereof."

The Court of Appeals in its opinion adopted the language of PARKER, P. J., when the case was first before this court on appeal (92 App. Div. 91, 94), where he said: "Now, he was evidently entitled to the possession of such fund if he demanded it for the purpose of engaging 'in any business or enterprise;' and it seems to me that such a purpose is so broad and so personal to the beneficiary that it is equivalent to a direction that he is entitled to it whenever he asks for it," and the Court of Appeals held that the object of the trust included the right of the beneficiary to take the corpus of the estate at will by simply notifying the trustee that he wished to engage in some business or enterprise, and that while the possession and title were

thus subject to his control, the court would declare the estate vested as to his creditors.

In the case at bar the beneficiary was not entitled to the possession or ownership of the devised property at will, and was only entitled to have it transferred to him when he should "become free and discharged from all his debts, judgments, claims and demands against him." The claim of the respondent that the cases are parallel, in that in the case at bar the beneficiary may at his will apply a portion of the estate to the payment of the judgment and be then entitled to the absolute ownership of the remainder, is contradicted by the express wording of the will which declares in most positive language that no part of the testatrix's property shall be used in the payment of the debts of her son. The judgment was obtained against Adon S. Morris as the indorser of a promissory note of less than \$200, and the testatrix plainly intended that the liability should be discharged by the maker of the note, or if by her son, then from funds entirely outside those of her estate. We think the decision applicable to the question at issue is that of *Hull v. Palmer* (213 N. Y. 315), the opinion in which was not handed down until long after the trial and decision of the case at bar. In that case the will bequeathed the sum of \$50,000 in trust, the net income to be paid or applied for the use of the testator's son, and then provided: "It is my wish in making this provision that my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund. In order to carry out this design I expressly authorize and empower my said trustee upon receiving a written statement from my said son saying that he is financially solvent and able to pay his just debts and liabilities from resources other than the principal of this trust fund * * * to pay over to my

said son, absolutely in its own judgment, * * * the principal of the said trust fund."

Judge MILLER, writing for an unanimous court, said: "It is to be observed that this is not a case in which a testator has undertaken to make a gift, and to keep it from his donee's creditors. It might in some aspects be termed a gift to encourage the donee to pay his debts, because, only by making such payment, or by showing the ability to pay, could the donee have the gift. * * * The testator had a right to impose that condition. He had a right to keep his property away from his son's creditors by not giving it to his son at all, unless the latter was able to pay his debts from other resources, and in the plainest language the testator manifested an intention to do precisely that thing."

We think that decision is applicable in the case at bar, and that the provision in question is valid.

The judgment appealed from should be reversed, with costs, and judgment directed for the defendants dismissing the complaint upon the merits, with costs in all the courts.

All concurred.

Judgment reversed, with costs, and judgment directed for the defendants dismissing the complaint upon the merits, with costs in all the courts.

LULU F. ADAMS, Respondent, v. EDITH HOYT SWIFT, Appellant,
Impleaded with FRANCES A. FRANCIS and Others, Defendants.

(*Supreme Court, Appellate Division, First Department, November 19, 1915.*)

WILL—ACTION TO ESTABLISH WILL UNDER SECTION 1861, CODE OF CIVIL PROCEDURE—HUSBAND AND WIFE—ANTE-NUPTIAL AGREEMENT TO LEAVE PROPERTY TO WIFE BY WILL—JURISDICTION—SURROGATE'S COURT—POWERS OF COURT OF EQUITY—STATUTE OF FRAUDS—EXECUTION OF PAROL ANTE-NUPTIAL AGREEMENT.

Where a woman marries on the faith of her husband's oral ante-nuptial agreement to make a will in her favor, which promise he subsequently fulfilled, but afterwards made other testamentary disposition of his property, the Surrogate's Court has no jurisdiction to determine the validity of the ante-nuptial agreement or to enforce its provisions.

But the Supreme Court under its inherent equitable powers has jurisdiction to enforce such ante-nuptial agreement in an action brought under section 1861 of the Code of Civil Procedure to procure a judgment establishing the will made pursuant to said agreement, the same being inaccessible owing to the fact that it has been probated in a foreign State, and in such suit the court may enjoin the probate of the subsequent will.

A person may bind himself by contract to make a particular disposition of his property by will, and such contract, if validly made upon a sufficient consideration, will be enforced in equity.

Although such parol ante-nuptial agreement is unenforceable while executory, the Statute of Frauds does not apply where, after the marriage, the promisor actually executed the contract by making a will pursuant to its terms.

MCLAUGHLIN, J., dissented.

APPEAL by the defendant, Edith Hoyt Swift, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 10th day of June, 1915, upon the decision of the court after a trial at the New York Special Term.

The judgment established a certain paper as and for the last will and testament of Albert A. Adams, deceased, and restrained the probate of a later paper purporting to be his will.

Frost & Nieman, for the appellant.

George C. Lay, for the respondent.

SCOTT, J.— This is an action to probate a will under the provisions of section 1861 of the Code of Civil Procedure, which provides that an action to procure a judgment establishing a will may be maintained by any person interested in the establishment thereof, "Where a will of real or personal property or both has been executed in such a manner and under such circumstances that it might, under the laws of the State, be admitted to probate in a Surrogate's Court, but the original will is in another State or county under such circumstances that it cannot be obtained for that purpose; or has been lost or destroyed by accident or design before it was duly proved and recorded within the State."

The will sought to be established is that of Albert A. Adams, a resident of this State who died at Phoenix, Ariz., on November 24, 1913, in which will the plaintiff, his wife, is named as general legatee. The original will cannot be produced because it is now on file in the Superior Court of Maricopa County, Ariz., whence under the laws of Arizona it cannot be removed.

The defendants are the beneficiaries under a later will, and the question involved is as to the validity of the later will. That question is purely one of law, there being no dispute as to any of the material facts.

At the time of the making of the will now sought to be proved, Albert A. Adams was a resident of the State of New York, engaged as a traveling auditor by the Standard Oil Company. He was about sixty years of age and in poor health. He had no immediate family, his nearest relative being a sister.

On October 27, 1909, he married the plaintiff, then about thirty years of age, who had been a school teacher. Four days later he executed the will now sought to be probated, by which

he gave all of his estate to plaintiff, except a legacy of \$1,000 given to a Miss Clarke.

It appears from the undisputed and unimpeached evidence of a wholly disinterested witness, as to statements made by Adams to the witness that this will was made pursuant to an ante-nuptial agreement between Adams and the plaintiff that if she should marry him he would make a will in her favor and leave all he had to her at his death. This witness was one Charles O. Scholder, the special agent of the Standard Oil Company at Memphis, who had known Adams for several years but had had no acquaintance with plaintiff until the time of the marriage. He testified that Adams came into his room shortly before the date of the marriage and stated that he had met plaintiff in Denver and had made a proposition of marriage to her, and that he wanted to open up this proposition to the witness, so that he should know all about the circumstances. The witness then proceeded: "At which time he (Adams) stated that he had agreed to give Miss Fowkes (the present plaintiff) all that he had at the time of his death, by will, and that his reason for doing this was that he was not in good health, he was lonesome traveling around, and that he thought that possibly by having somebody with him, a helpmate, it would give him company and be able to look after him and thereby get some of his worries down, which no doubt had some effect on his health in his latter years." He testified that on a later occasion Adams had reiterated his statement as to the agreement between plaintiff and himself, and that he was particular to have Mr. Scholder know all the circumstances "so that if at any time it became necessary he wanted a witness both to the marriage and to the agreement." After the marriage when Adams requested Scholder to be a witness to his will, he said: "This is in fulfillment of my agreement with Mrs. Adams in which I agreed to will her — give her all that I had by will, except \$1,000." The will that was then executed and is now

sought to be probated did give plaintiff all of Adams' property except \$1,000.

So we have as established facts of the case a pre-nuptial agreement that if plaintiff would marry testator he would make a will by which he should leave her and she would receive at his death all of his property except \$1,000; a fulfillment of the agreement by plaintiff on her part by entering into the marriage, and a fulfillment of the agreement by Adams on his part by the making of such a will as he had agreed to make. About two years later, on August 12, 1911, Adams executed another will in which he recited that he had given his wife three-fourths of his property, and then gave what he had left to the appellant Edith Hoyt Smith, his niece, in trust for her mother for life, with reversion to herself. There is no question as to the factum of either will, or as to the valid execution of either under the laws of this State, nor is there any suggestion of undue influence, lack of testamentary capacity or any of the other objections usually to be found in will contests. The earlier will, as has been said, cannot be produced and cannot, therefore, be admitted to probate in the Surrogate's Court.

The later will has been offered for probate in New York county, but has not yet been admitted, its probate having been stayed by a temporary injunction in this action, and being permanently enjoined by the judgment appealed from.

The plaintiff's claim is that the ante-nuptial contract by Adams to give all of his property to his wife at his death, by the execution of a will to that effect, having been fully executed by the marriage and the subsequent making of the will became a valid, binding and executed contract; that the first will was irrevocable, and that any subsequent will was invalid for lack of power in the testator to execute it.

The appellant makes several objections to the judgment which deserve consideration. She does not question the well-established rule that it is possible for a person to bind himself,

by contract, to leave his property in a particular way, and that if such a contract be validly made upon sufficient consideration it will be enforced in equity. She objects, however, that it cannot be enforced in this action. Her argument is that whatever claim plaintiff may have to all of the testator's estate must rest upon her contract with him, and not upon the will made in fulfillment of it; that the action in this court for the probate of the first will is merely substitutional for the ordinary probate proceedings in the Surrogate's Court, and that, but for the circumstance that the first will cannot be produced, application for its probate would have to be made to the Surrogate's Court, in which case that court would be obliged to refuse probate to the earlier will in favor of the later properly executed will, leaving plaintiff to sue the executors of that will in equity. It is quite true that upon an application for probate the Surrogate's Court would have no jurisdiction to try out the question of the making and effect of the ante-nuptial agreement, or to enforce its provisions. This is because the Surrogate's Court is of limited jurisdiction and has no general equity powers. With the Supreme Court it is different. It has general equity jurisdiction and is the court to which application would necessarily be made to enforce plaintiff's claim. Section 1861 of the Code of Civil Procedure while it extends the jurisdiction of the Supreme Court to the probating, under certain conditions, of wills does not purport to restrict, nor, in our opinion does it operate to restrict the general jurisdiction of the court, which still remains a court of general equity jurisdiction. It would result in great and quite unnecessary circuitry of action to drive plaintiff to two applications to the Supreme Court for the relief which can perfectly well be afforded in one, all the necessary parties being before the court, and all the essential facts provable before it. As was said by GRAY, J., in *Edson v. Parsons* (155 N. Y. 555): "The law permits a person to dispose of

his property at his pleasure. He may make a valid agreement binding himself to make a particular testamentary disposition of his property, if it be a reasonable one, and he may *validly renounce* the power to revoke his will in the absence of fraud or deceit." Assuming, for the purpose of discussing this particular objection, that the contract between Adams and his wife was, as she claims that it was, valid and executed by the making of the first will, we find no difficulty in holding that Adams thereby contracted away his right to revoke that will, and the second will, offered as a revocation, was ineffectual for that purpose. If it was it furnishes no obstacle to the probate of the earlier will, and the probate of the second will may properly be enjoined. These principles have been applied heretofore in well-considered cases. (*Mutual Life Ins. Co. v. Holloday*, VAN VORST, J., 13 Abb. N. C. 16; *Le Brantz v. Conklin*, LEVENTRITT, J., 39 Misc. Rep. 715.) We consider, therefore, that the action was well brought, and that the relief afforded by the judgment was within the authority and jurisdiction of the court.

The point upon which the appellant argues most strenuously and upon which she apparently mainly relies is that, assuming the contract to have been made as testified to it was void under the Statute of Frauds of this State, and under a similar statute of Colorado where the agreement was made, in that it was made in consideration of marriage and was not expressed in writing. The plaintiff's answer to this contention is that the statute applies to executory, and not to executed contracts, and that by the making of the first will the contract became fully executed.

It must be conceded, and the plaintiff does concede, that the mere fact of the marriage standing alone would not take the case out of the statute, and that even the reduction of the contract to writing after the marriage, with no other consideration than the marriage to support it, would not have avoided

the bar of the statute. For these undisputed propositions the appellant cites ample authority. Neither of these cases, however, is before us. On the contrary we have quite a different case. A pre-nuptial agreement that if plaintiff would marry the testator he would leave all his property to her by will; an acceptance of the proposal; a fulfillment of the agreement on plaintiff's part by marriage; a fulfillment of the agreement by testator by the making of such a will as he had agreed to make. Here then was an agreement entirely completed by both parties in so far as it was possible to complete it. Plaintiff on her part had, in fulfilling her agreement, taken an irrevocable step. It would be most unjust and inequitable to hold that the decedent having in form fulfilled his part of the agreement, could rescind his action and revoke his performance. The case does not differ in principle from *de Hierapolis v. Reilly* (44 App. Div. 22; *affd.*, 168 N. Y. 585) and *Kerker v. Levy* (140 App. Div. 428; *affd.*, 206 N. Y. 109). The case before us greatly resembles *Mutual Life Ins. Co. v. Holloday* (*supra*), which, although decided at Special Term, is entitled to much weight for the cogency of its reasoning, as well as for the high reputation of the justice who decided it. It arose out of a verbal contract between a husband and wife under which the husband conveyed to the wife, through a third party, a valuable piece of real estate, and she agreed that in case she died before her husband she would transmit the property to him by will. After the conveyance to her and in pursuance of her agreement she executed a will in favor of her husband. She predeceased her husband and remained seized and possessed of the property until her death. Shortly before she died she executed a will leaving the property away from her husband. The claim in that case, as in this, was that under the circumstances the first will was irrevocable, and that the second will was, therefore, invalid. In the course of the opinion VAN VORST, J., used many expressions which are as apposite to this case as if

written in it. He said: "If the agreement was valid in law and in equity, it would be a mockery of justice to say that having executed the will, she fully satisfied her part of the agreement, and was at liberty to revoke it the next day. The right secured by her husband was substantial, and could not be defeated by another will. The spirit and true intent of the agreement, under which she became seized of and enjoyed the estate, obliged Mrs. Holloday to adhere thereafter to the terms of the devise in her husband's favor. * * * If one of the contracting parties induces the other so to act, that if the contract be abandoned he cannot be restored to his former position, the contract must be considered as perfected in equity, and a refusal to complete is in the nature of a fraud * * *. To defeat this conclusion, it cannot be insisted that a will is in its own nature ambulatory and revocable during the life of the testator. That statement, true in itself, can have no application to a case where the testator has obligated himself by a valid agreement founded upon a good consideration, which is wholly inconsistent with the making of another will, by which he should attempt to devise the property, the subject of the agreement, to others than the person from whom the consideration proceeded, and to whom he was bound by the terms of the agreement to devise it. 'Indeed, the doctrine of the revocability of a will amounts merely to this, that a will is ambulatory during the lifetime of the testator, provided he has not bound himself to change it' (1 Jarman on Wills [5th Am. ed. by Bigelow], 18, note). * * * The absolute right to dispose of property as the testator may elect at any time during life, may be abridged or modified by express contract, as other rights often are. And the obligation not to revoke or change a will, although negative, is as much involved in the agreement as the affirmative duty to devise in a certain way."

The views thus expressed are well supported. (Sherman v.

Scott, 27 Hun, 331, cited by Judge VAN VORST as *Sherman v. Butts.*)

I have not overlooked the very recent case of *Wallace v. Wallace* (216 N. Y. 28), in which the Court of Appeals had once more to consider the question of the irrevocability of mutual wills. To a certain extent that case is an authority in plaintiff's favor, for it recognizes the well-established rule that it is possible for a person to make a valid and binding contract to dispose of his property in a certain way by will. It was held, as it has been in many earlier cases, that the evidence required to establish the fact of such a contract must be clear and convincing, and the case turned upon the insufficiency of the evidence relied upon to establish the contract sought to be enforced. Two witnesses testified as to statements made by or in the presence of the decedent, but the court found that neither of these witnesses was disinterested, and their evidence as to the declaration they had heard was much too inconclusive to warrant a finding of such a contract as was sought to be established.

In the principal case we have, it is true, the evidence of but a single witness as to the declaration made by Adams concerning the agreement he had with plaintiff, but that witness is clearly disinterested, and no attempt is made to impeach him or to discredit his testimony. Indeed the appellant has argued her case upon the tacit assumption that the witness Scholder testified truly as to his conversation with the decedent. If that evidence be accepted as true it discloses much more than chance declarations made by Adams as to his agreement with plaintiff. It appears, as has already been said, that Adams expressly declared that he stated to Scholder the terms of the contract with plaintiff "so that if at any time it became necessary he wanted a witness both to the marriage and to the agreement." It seems to me that this testimony fulfills the

most exacting requirements as to the quality of evidence necessary to establish the contract upon which plaintiff sues.

The judgment appealed from must be affirmed, with costs.

INGRAHAM, P. J., LAUGHLIN and DOWLING, JJ., concurred; McLAUGHLIN, J., dissented.

Judgment affirmed, with costs.

In the Matter of the Judicial Settlement of Proceedings of
CAROLINE M. TAMARGO, as Administratrix with the Will
Annexed of GERTRUDE VOSSELER, Deceased.

ANNIE MILLER and Others, Appellants; JOSEPH MANKE and
Others, Respondents.

(*Supreme Court, App. Div., First Department, November 12, 1915.*)

WILL CONSTRUED—GIFT OF CONTINGENT REMAINDER TO HEIRS OF LEGATEE IF
SHE DIES BEFORE TESTATRIX.

Where a gift of a residuary estate is made to specified persons, "their heirs and assigns, to have and to hold the same for their own use, benefit and behoof forever, share and share alike, *per stirpes* and not *per capita*," the provision should be read as if the words "*per stirpes* and not *per capita*" followed "assigns" before the *habendum* clause, for they relate to the persons who are to take and not to the quality of the estate to be taken.

Although one of the residuary legatees was dead at the time the will aforesaid was executed, and the legacy to her lapsed because she was not a descendant of the testatrix, there was no intestacy as to that gift, for the testatrix by the words aforesaid intended that if the beneficiary named should predecease her, the gift should go to the heirs of said beneficiary "*per stirpes* and not *per capita*."

If possible, that construction will be given to a will which avoids intestacy.

INGRAHAM, P. J., and SCOTT, J., dissented.

SEPARATE APPEALS by Annie Miller and another, and by J. Robert Rubin, as special guardian of William Bourdet, from

part of a decree of the Surrogate's Court of the county of New York, entered in the office of said Surrogate's Court on the 18th day of March, 1915.

The part of the decree appealed from adjudges that a bequest and devise of one-fourth of the residuary estate to testatrix's sister-in-law, Anna V. C. Helbig, misnamed Helbusch in the will, has lapsed and that the next of kin and heirs at law of the testatrix take such one-fourth interest in the same manner as though the deceased, as to it, had died intestate.

Grenville Clark (Silas W. Howland with him on the brief), for the appellants Miller and Edward Bourdet.

J. Robert Rubin, special guardian, in person.

Arthur Butler Graham, for the respondent administratrix
c. t. a.

William Duncan Cameron, special guardian for Joseph Manke, II, and another.

Benjamin E. Messler, for the respondents Joseph Manke and others.

LAUGHLIN, J.—The will was executed on the 25th day of March, 1911, and the testatrix died two days thereafter. The 1st paragraph of the will directs the payment of debts, funeral expenses and expenses of administration, and the 2d makes bequests to two individuals named, who are designated "friends" of the testatrix, and these bequests were to them "to have and to hold the same for their own use, benefit and behoof forever, share and share alike." By the 3d paragraph she devised and bequeathed the rest, residue and remainder of her property by provisions as follows: "Unto the following named persons, viz: My brother-in-law Jacob Vosseler, my niece

Lena Damarco nee Meixmer, my sister-in-law Mrs. Helbusch nee Vosseler, and my sister-in-law Mary Vosseler, the two last named being residents now or late of the city of New Orleans, La., their heirs and assigns, to have and to hold the same for their own use, benefit and behoof forever, share and share alike, *per stirpes* and not *per capita*."

It is perfectly plain that these provisions are to be construed precisely as if the words "*per stirpes* and not *per capita*" followed "assigns" before the habendum clause, for they clearly relate to the persons who are to take and not to the quality of the estate to be taken. The will contains no other devise or bequest. It will be observed that the phraseology in the 3d paragraph differs materially from that in the 2d and that there is here manifested a plain intention that all the property here devised and bequeathed should go to the relatives of the husband of the testatrix from whom appellants offered to show she received the property, and to no one else, and she evidently believed that she had effectually disposed of it. The law does not favor a construction which will cause partial intestacy and the intention of the testatrix to dispose of all her property must be given effect if the provisions of the will are susceptible of a construction which will accomplish that purpose. (Schult v. Moll, 132 N. Y. 122; Tyndall v. Fleming, 123 App. Div. 837; Terry v. Wiggins, 47 N. Y. 512; Norris v. Bayea, 13 id. 273.) Mrs. Helbig died in New Orleans in the year 1905, leaving as her sole heirs two daughters, the appellant Miller and Catherine Bourdet, both of whom survived the testatrix, but Catherine subsequently died, leaving no husband but two sons, the appellants Bourdet, her sole heirs at law. It does not appear whether Mrs. Helbig resided in New Orleans, but her daughter Catherine resided and died there in 1912. There is no evidence other than the provisions of the will with respect to whether the testatrix at the time she made the will was aware of the fact that Mrs. Helbig had died.

The learned surrogate in construing the will has given no force or effect to the words, "their heirs and assigns, to have and to hold the same for their own use, benefit and behoof forever, share and share alike, *per stirpes* and not *per capita*." If the will is to be construed as if those words had been omitted, manifestly his construction is right, for such a devise or bequest to one who is dead lapses, and it would not be saved by the words "heirs and assigns" or "share and share alike" (Matter of Wells, 113 N. Y. 396; *Everitt v. Everitt*, 29 id. 39; *Brown v. Brown*, 54 App. Div. 6); and it could not go to those who take the other three-fourths either on the theory that it was a devise and bequest to a class, or as joint tenants, for our statute declares such a devise to create a tenancy in common unless expressly declared by the instrument to be a joint tenancy, which is not the case here. (Real Prop. Law [Consol. Laws, chap. 50; Laws of 1909, chap. 52], § 66; Matter of Kimberly, 150 N. Y. 90; Matter of Hoffman, 201 id. 247.) It was stipulated that Mrs. Helbig was not the daughter or a descendant of the testatrix and not within the statute which at that time had only changed the common-law rule as to them. (Decedent Estate Law [Consol. Laws, chap. 13; Laws of 1909, chap. 18], § 29.)* It may be that the testatrix was in doubt whether her sister-in-law was alive at the time the will was made, and if so, that would account for the phraseology employed; but assuming that she supposed her sister-in-law was then living, and charging her with knowledge of the law that in the event that the sister-in-law predeceased her the legacy would lapse, and that in the event the sister-in-law survived her the bequest and devise would at once become absolute and that the heirs of the sister-in-law could neither have nor take any interest under the will — still it was entirely competent for the testatrix to provide that in the

* Since amd. by Laws of 1912, chap. 384.—[REP.]

event that her sister-in-law predeceased her she desired that the heirs of the sister-in-law should take and that they should take *per stirpes* and not *per capita*. The use of the words "*per stirpes* and not *per capita*" are decisive against the word "heirs" being construed as words of limitation merely. (Jarman Wills [6th Eng. ed.], 1321.) It is far more reasonable, in my opinion, to attribute to the testatrix this intention and to give her will that construction than to hold that the attorney she employed to draft her will inserted this clause through incompetence and without accomplishing anything thereby. The clause is appropriate to indicate this meaning, and the words employed with respect to a taking *per stirpes* and not *per capita* are wholly inappropriate on any other theory. There appears to be no controlling authority in this jurisdiction, but I think this construction is supported by decisions in other jurisdictions and by eminent text writers. (See *Dick v. Lacy*, 8 Beav. 214; *Atherton v. Crowther*, 19 id. 448; *Rothmanskey v. Heiss*, 86 Md. 633; *Pearson v. Stephen*, 5 Bligh [N. S.], 203; Jarman Wills [6th Eng. ed.], 1321; Page Wills, § 552 *et seq.*) In *Dick v. Lacy* (*supra*) the words *per stirpes* were deemed controlling with respect to the construction of a gift after a prior life estate to "the daughters of Captain Boyce, and their descendants *per stirpes*, to hold to them, their heirs and assigns forever." It was held that the heirs of a daughter of Captain Boyce, who died before the termination of the life tenancy, took by substitution the share that their mother would have taken had she lived until the termination thereof, and this was placed upon the use of the words *per stirpes*, without which, the court said, it would have been necessary to construe the words "heirs" and "assigns" as words of limitation, and that the heirs of the daughter dying before the termination of the life tenancy would have taken nothing.

In my opinion, therefore, the learned surrogate erroneously construed the will.

It follows that the provisions of the decree from which the appeals are taken should be reversed, with separate bills of costs to appellants appearing separately, and the decree should be modified in accordance with these views.

MCLAUGHLIN and CLARKE, JJ., concurred; INGRAHAM, P. J., and SCOTT, J., dissented and voted to affirm on the opinion of the surrogate (Matter of Vosseler, 89 Misc. Rep. 674).

Decree reversed, so far as appealed from, with separate bills of costs to appellants appearing separately, and decree modified as stated in opinion. Order to be settled on notice.

In the Matter of the Determination of the Construction and Effect of a Disposition of Property Contained in the Last Will and Testament of BRIDGET HADDOCK, Deceased.
MICHAEL HADDOCK, Individually and as Executor, etc., of BRIDGET HADDOCK, Deceased, and Others, Appellants; JOHN HADDOCK, Respondent.

(*Supreme Court, App. Div., Third Department, November 10, 1915.*)

REAL PROPERTY—WILL—TENANTS IN COMMON.

A testatrix, by will drawn by a layman, gave and bequeathed unto her sons John and Thomas a homestead, with the buildings thereon "jointly to be divided by said sons as they may deem fit and proper, or to be held jointly if they choose." This was the only devise or bequest to John. The testatrix also gave two legacies "to be paid by my son John Haddock from the proceeds of his bequest."

Held, that the testatrix intended to use the term "jointly" in the sense of "together," and that John and Thomas were seized of the homestead as tenants in common.

APPEAL by Michael Haddock, individually and as executor, and by certain of the heirs at law of Thomas Haddock, de-

ceased, from a decree of the Surrogate's Court of the county of Sullivan, entered in the office of said Surrogate's Court on the 12th day of April, 1915, adjudging that John and Thomas Haddock, the beneficiaries under the 2d clause of the will of Bridget Haddock, deceased, became seized of the real property therein described as joint tenants, and not as tenants in common.

Robert B. McGinn (Joseph Rosch of counsel), for the appellants.

Fullerton & Parshall (William A. Parshall of counsel), for the respondent.

LYON, J.—The single question presented upon this appeal is whether John and Thomas Haddock, sons of the testatrix, took title as joint tenants or as tenants in common, under the will of Bridget Haddock, deceased. The will consists of three clauses. The first simply directs the payment of the just debts and funeral expenses of testatrix. The last simply appoints her son Michael executor. There is no disposition of residuary estate, and the only bequests of personal property are of one hundred dollars each to sons and daughters, which in each instance is made a charge upon real estate. The provisions of the 2d clause of the will, so far as material to be considered upon this appeal, are as follows: "*Second*— * * * I give and bequeath unto my sons John Haddock and Thomas Haddock the homestead consisting of fifty acres of land containing the boarding house and other buildings. This bequest is given to my sons John and Thomas jointly to be divided by said sons as they may deem fit and proper, or to be held jointly if they choose." Later the testatrix gives and bequeaths to her stepson, Patrick Haddock, and to her stepdaughter, Maria McKerness, the sum of one hundred dollars each. Following such

bequests is the following provision: "The bequests of money given to Patrick Haddock and Maria McKerness are to be paid by my son John Haddock from the proceeds of his bequest * * *." The only devise or bequest to John Haddock is that above noted. The testatrix died in August, 1914. Thomas Haddock died intestate in February, 1915, leaving three brothers and four sisters, his sole heirs at law, and without having aliened his interest in the land. John thereupon claimed to be the sole owner by reason of survivorship. This proceeding was thereafter instituted to obtain a construction of the will in respect of the character of the tenancy of John and Thomas. The surrogate adjudged that their seizure was as joint tenants and not as tenants in common. From the decree entered thereon this appeal has been taken.

The case of *Overheiser v. Lackey* (207 N. Y. 229) seems to be decisive of this question. However, the respondent seeks to draw a distinction between that case and the case at bar in that in the case at bar words additional to "jointly" indicate that a joint tenancy and not a tenancy in common was intended, and that the will in question contains no provision which could by any possibility be construed as inconsistent with an intention to create a joint tenancy. In the *Overheiser* case the language of the devise was: "I give and devise to my daughters * * * jointly, the lot of ground with the dwelling house * * *." This was followed by a clause giving and devising to said devisees an interest in the residuary estate. By a later clause of the will the testator directed his executors to act as trustees for one of the devisees and to receive in trust her portion of the estate and to act for her in selling and conveying her interest therein. In the case at bar, as has been noticed, the share of John Haddock is charged with the payment of the two legacies to his brother and sister, Patrick and Maria, "to be paid by my son John Haddock from the proceeds of his bequest."

In the same clause of the will the testatrix charges the farm of fifty acres which "I give and bequeath to my son Michael Haddock," with the payment of three legacies to her three daughters of \$100 each in the following language: "The bequests of money given to my daughters * * * are to be paid by my son Michael Haddock from the proceeds of his bequest." The only devise or bequest made to Michael Haddock is that of this farm. The farm devised to John and Thomas is described as consisting of fifty acres of land, with a boarding house and other buildings. The direction that the two legacies are to be paid by John from the proceeds of his bequest might, under some circumstances, be held to imply that the testatrix contemplated the sale by him of his interest in the farm. This view is contradicted, however, by the provision that John and Thomas may hold it "jointly" if they choose. The will was drawn by a layman. This is not only conceded by the parties to the litigation, but is plainly evident from the language of the will itself. It is not probable that either the testatrix or the writer of the will understood the distinction between joint tenancy and tenancy in common. It is far more consistent with the apparent intent of the testatrix to believe that the interest in real estate upon which she sought to charge the payment of these legacies was that of John as a tenant in common, rather than that of John as a joint tenant with Thomas, whose interest in the real estate was subjected to no charge.

Gathering the intent of the testatrix from the whole will, it would appear probable that she intended to use the term "jointly" in the sense of "together." Such is a meaning commonly given to the word. Webster's International Dictionary defines "jointly" as "In a joint manner," "together," "unitedly," "in concert," "not separately." The Standard Dictionary gives practically the same definition, adding "in conjunction." The word "jointly" was evidently intended

to be used, not as a legal term, but in its ordinary meaning, and probably without knowledge that, as applied to real estate, it involved the idea of survivorship. Furthermore, section 66 of the Real Property Law (Consol. Laws, chap. 50; Laws of 1909, chap. 52) provides: "Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy."

We think it should be held that John and Thomas were seized of the real property in question as tenants in common, and hence that the decree of the surrogate should be reversed, with costs to the appellant.

All concurred.

Decree reversed, with costs to the appellant, and decree directed to the effect that John and Thomas Haddock held the said real estate as tenants in common and not as joint tenants.

In the Matter of the Judicial Settlement of the Account of Proceedings of JEANIE CORWIN VILES, formerly JEANIE S. CORWIN, as Administratrix, etc., of B. RYDER CORWIN, Deceased.

ORVILLE B. ACKERLY, Appellant; JEANIE CORWIN VILES, as Administratrix, Respondent.

(*Supreme Court, App. Div., Second Department, November 12, 1915.*)

DECEDENT'S ESTATE—INSURANCE PAYABLE TO WIFE IF LIVING, OTHERWISE TO LEGAL REPRESENTATIVES—WHEN "LEGAL REPRESENTATIVES" CONSTRUED TO MEAN NEXT OF KIN.

Where, upon the judicial settlement of the accounts of an administratrix who was the daughter and only heir and next of kin of the deceased, with whom she lived until his death, it appeared that a policy of insurance taken out by the decedent was payable "to his wife, Jane S.

Corwin, if living; otherwise to his legal representatives;" that the word "assigns" was omitted; that the decedent's wife predeceased him; that he died without real property and possessed of but little personalty aside from the proceeds of the insurance, and that he was not a lawyer, the term "legal representatives" as used in the policy of insurance should be held to mean the next of kin and not the administrator.

APPEAL by Orville B. Ackerly from a decree of the Surrogate's Court of the county of Kings, entered in the office of said Surrogate's Court on the 8th day of October, 1914.

The controversy involves the reasonableness of certain expenditures for funeral expenses and the disposition of the proceeds of a life insurance policy collected by the administratrix.

Darwin J. Meserole, for the appellant.

Frederick C. Tanner (Edward Gates with him on the brief), for the respondent.

PER CURIAM.—We think that the conclusion of the Surrogate's Court that the term "legal representatives," as used in the policy of insurance meant the next of kin and not the administrator, should be approved. The policy of \$3,000 taken out by the decedent was payable "to his wife, Jane S. Corwin, if living; otherwise to his legal representatives." The court found that the word "assigns" was omitted therefrom. A stipulation agreed upon as the sole source of proof showed that decedent's said wife predeceased him; that the accountant is his daughter, only heir and next of kin; that she lived with the decedent until his death; that decedent died without real property, possessed of personalty aside from the proceeds of the insurance of but \$1,479.69, and that decedent was not a lawyer. We think the conclusion of the Surrogate's Court may be sustained by the authority of *Griswold v. Sawyer* (125 N. Y. 411). CULLEN, J., in *Leonard v. Harney* (173 N. Y. 352, 354) said that the principal ground, as "very clearly pointed out by

Judge EARL in the case of *Griswold v. Sawyer*," upon which *Griswold v. Sawyer* was decided was the omission of the word "assigns" in the policy. Other considerations like unto some of those which moved the court in *Griswold v. Sawyer* may be urged in this case, such as the general purpose of life insurance, the financial condition of the decedent as revealed at his death, the existence of a wife and of a daughter who resided with him, and the fact that decedent was not a lawyer. We see no reason for disturbance of the court's disposition of the item in her accounts for funeral expenses, in the absence of cross-examination of the accountant and of any evidence offered as to the unreasonableness of the charge.

The decree of the Surrogate's Court of Kings county is affirmed, with costs to the respondent payable out of the estate.

JENKS, P. J., THOMAS, MILLS, RICH and PUTNAM, JJ., concurred.

Decree of the Surrogates' Court of Kings county affirmed, with costs to the respondent payable out of the estate.

In the Matter of the Judicial Settlement of the Account of Proceedings of UNION TRUST COMPANY OF NEW YORK as Substituted Trustee under the Will of CHRISTIAN E. DETMOLD, Deceased, for WILHELMINA EMILIE (COUNTESS GASTON) D'ARSCHOT.

EDWARD DETMOLD LENTILHON, Appellant; THE UNION TRUST COMPANY OF NEW YORK and Others, Respondents.

(*Supreme Court, App. Div., First Department, December 3, 1915.*)

WILL—CONTINGENT REMAINDERS—DEVISE TO "ISSUE" OF DECEDENT CONSTRUED—DISTRIBUTION OF PROPERTY PER STIRPES.

A testator, after providing an annuity for his wife out of the net income of his real and personal property left in trust, gave the remainder to his trustees in two equal shares to collect and pay the net income of one share, after deducting one-half of the annuity to the use of each of his daughters for life. After providing for the death of either of the daughters during the life of his wife, the will provided "Should my said wife die before either of my daughters then and in that case upon each daughter's death, I give, devise and bequeath the share in my said real and personal estate theretofore held in trust for her in equal portions unto her then surviving issue, if any; or, if no such issue shall then survive, I direct that her said share shall be added to the share then held in trust for my other daughter, if she shall then survive; or, if not, then I give, devise and bequeath the same in equal portions to her issue, if any then surviving." The testator's wife died before the daughters. One daughter died leaving her surviving nine children and one granddaughter who died on the day of her birth. The other daughter subsequently died without issue. Provisions of the will examined, and

Held, that it was the intention of the testator to limit the meaning of the word "issue," and that the share left in trust for the daughter who died without issue should be distributed among the issue of her sister *per stirpes*.

DOWLING, J., dissented, with memorandum.

APPEAL by Edward Detmold Lentilhon from part of a decree of the Surrogate's Court of the county of New York, entered

in the office of said Surrogate's Court on the 16th day of April, 1915, construing the will of Christian E. Detmold, deceased.

James R. Deering, for the appellant.

Egerton L. Winthrop, Jr., for the infant respondents Emilie L. Gilford and others.

Albert de Roode, for the infant respondents Marie de T. L. Boynton and others.

Daniel J. Mooney, for the infant respondents Joseph Lentilhon and others.

John Reilly, for the infant respondent Elizabeth W. B. Gilford.

Miller, King, Lane & Trafford, for the respondent Union Trust Company of New York.

INGRAHAM, P. J.—This is an appeal from the surrogate involving the construction of the will of Christian E. Detmold, who died a resident of the county of New York on July 2, 1887, leaving a last will and testament which was duly admitted to probate. By this will the testator gave to his wife an annuity of \$8,000, which was to be paid out of the net income of his real and personal property thereafter given in trust for his two daughters. By the 3d clause of the will all the rest, residue and remainder of his estate, subject to the annuity to his wife, he gave to his trustees thereafter named in two equal shares in trust to collect and apply the net income of one of such shares, after deducting one-half of said annuity, to the use of each of his said daughters for life. The testator's wife died March 14, 1889, leaving her surviving two daughters, one Zella

and the other Wilhelmina, Countess d'Arschot. Zella died November 7, 1891, leaving her surviving eight children. The Countess d'Arschot died February 21, 1912, without issue. Zella had one *grand*daughter named Leonie, who was born alive on June 21, 1912, and died on the same day. The question presented was, who was entitled upon the death of the Countess d'Arschot to the share left in trust for her?

After making provision for the death of either of the daughters during the life of his wife, the will provides: "Should my said wife die before either of my daughters then and in that case upon each daughter's death, I give, devise and bequeath the share in my said real and personal estate theretofore held in trust for her in equal portions unto her then surviving issue, if any; or, if no such issue shall then survive, I direct that her said share shall be added to the share then held in trust for my other daughter, if she shall then survive; or, if not, then I give, devise and bequeath the same in equal portions to her issue, if any then surviving." Wilhelmina survived the testator's widow and also her sister Zella, and thus this clause of the will became applicable: "then I give, devise and bequeath the same in equal portions to her issue, if any then surviving," subject to the exercise of the power of appointment given to Wilhelmina.

The surrogate then found as a conclusion of law that it was the testamentary intent of the testator that the word "issue" in article 3 of the will should include descendants to the remotest degree without limitation to a particular generation; that subject to the power of appointment created in and by article 5 of the will, the remainder of the trust under the will for the benefit of the Countess d'Arschot became distributable upon her death in equal shares *per capita* among all the descendants of the testator then living or in being; that Leonie, an infant child of one of the daughters of Zella, having been born alive on June 21, 1912, and died on that date, was

in being on February 21, 1912, the day of the death of the Countess d'Arschot, and was entitled to a distributive share of the remainder of the trust for the benefit of Countess d'Arschot, although the mother of Leonie was also living at the time of her death and is still alive. This decree depends, therefore, upon the question as to whether the testator intended that the property held in trust for the Countess d'Arschot should be distributed among the descendants of her sister Zella *per capita* and not *per stirpes*, or whether it was the intention of the testator that in case of Zella's death before her sister, the Countess d'Arschot, the children of the daughter Zella should take *per stirpes*, the descendant of any deceased child taking her parent's share by way of representation.

The rule to be applied in such a case was before this court in the case of *Matter of Farmers' Loan & Trust Company*, construing the will of the late Valentine Mott (163 App. Div. 533), and on appeal before the Court of Appeals (213 N. Y. 168). The question there was as to the distribution of the share of the testator's estate to be held in trust for his granddaughter Fannie Mott. The clause in Dr. Mott's will under which the question arose was as follows: "In case of the death of either of my children before the division of my estate, I give, devise and bequeath what would have been his or her share, if living, to his or her issue, if any, such issue to take equally what would have been the parent's share. If no issue, then I give, devise and bequeath such ninth part to my surviving children and the issue of those deceased." The granddaughter, Fannie Mott, afterward became Fannie Mott Campbell; she died in 1912, leaving two daughters. One grandchild was the child of one daughter, and three were the children of the other daughter. As the Court of Appeals there said: "The will gave this share of the estate, on the death of Mrs. Campbell, to her 'issue;' and the meaning of that term as here used is the question for decision." The surrogate in that case, as in this,

held that the word "issue" meant descendants, and was not limited to children, and division should be made *per capita* among the descendants of every degree. In that decree the two children of Mrs. Campbell and the four grandchildren were entitled each to one-sixth of the share in question. In stating its conclusion the court said: "We agree with the learned surrogate that the word issue was intended to include descendants; but we do not share his view that the gift was to be made *per capita*, with the result that children would take concurrently with their living parents. * * * We think that the will reveals a purpose that the issue should take *per stirpes*. * * * The rule is that unless some other meaning is given to it by the context, the word issue is not confined to children, but includes descendants in any degree. * * * Another meaning will not readily be given if the result would be to divert the gift from the direct line of descent. Where there is a gift to a child or grandchild for life, and over on the death of such child or grandchild in default of issue, the courts have held it to be 'an unnatural construction which would exclude all but the immediate children of the first taker, in favor of the other branches of the family. The reasonable construction in such cases is that the gift over was intended to take effect only on the extinction of the line of descent from the first taker.' * * * This testator provided that in case of the death of his children before the wife's life estate had terminated, their issue should take their share, and only in default of issue was there a gift to others. To say that by the gift to issue he meant children, but not grandchildren, is to impute to him a purpose to disinherit one branch of descent to the enrichment of another. There is nothing in this will to justify us in deviating from the settled rule that a construction leading to such consequences ought generally to be avoided. * * * On the contrary this testator seems to have used the words children and issue, not at all as synonymous, but with

accurate discrimination. * * * We are thus brought to a consideration of the question whether the gift to the issue of Mrs. Campbell was one *per capita* or *per stirpes*. If it was *per capita*, children and grandchildren take concurrently. If it was *per stirpes*, they take by representation. * * * We think that it may fairly be gathered from the context that the gift was to be *per stirpes*. The presumption in this State favors a *per capita* distribution, * * * but the presumption yields to 'a very faint glimpse of a different intention.' * * * Equality of division is to be preserved, but only within the limits consistent with a division *per stirpes*."

With the rule as thus stated, we are to examine this will to see if we can find in it an intention that the issue of a daughter dying before the life beneficiary should take *per stirpes* and not *per capita*. The learned surrogate in his opinion (89 Misc. Rep. 69) examines this case of Dr. Valentine Mott's will, and states that in his opinion it only reiterated the doctrine that the term "issue" in its primary signification must always be construed to mean that all descendants take *per capita*, but that a distribution *per stirpes* may be implied where the testator in any possible manner indicates a purpose to have those included within the class take by way of representation; and he held that in the will in question there is nothing to indicate that the testator used the term "issue" in any other than its primary and most ordinary signification; that the issue as a class, it is true, is substituted, but representation amongst them is not provided for in any way. It is in this conclusion that I disagree with the learned surrogate. The share to be held in trust for each of the daughters of the testator was upon her death to be divided among her issue. In determining this class, I think it is quite important to consider the whole scheme of the testator. He evidently wished to insure his wife an annuity of \$8,000 during her life, and, subject to that annuity, his two daughters during their respective lives were to have the income of

his estate. Upon the death of each daughter, the principal of the share held for such daughter was to be divided among her issue, and if either daughter died during the life of his wife, the income of her share not necessary to provide for one-half of that annuity was to be paid to the issue of the daughter dying if she left issue, or if she left no issue, then to her surviving sister, or in equal parts to and among the issue of such sister if she should have died leaving issue then surviving. Most careful provision is made to meet any contingency that might arise; but it seems to me quite unreasonable to suppose that the testator intended that this surplus income, which had been reserved for one of his daughters upon her death, should have been divided among all of his grandchildren living, the descendants of his daughter taking regardless of the question whether their parents were alive or not. One of his granddaughters may have had no children, or one child, while another granddaughter may have had several children, which would create a very unequal distribution of this income, giving to the family of one grandchild, although that grandchild was still living, a much larger proportion of this surplus income than in the case of a grandchild having no children. I think it was reasonable to suppose that the testator had in mind an equality in distribution of this income. He says "or in equal portions to and among the issue of such sister, if she shall then have died leaving issue then surviving." To hold, if a daughter dying left children and grandchildren and great grandchildren, that all should join in such distribution of income regardless of any idea of representation among his grandchildren, would be an unequal and not an equal distribution. Again, that idea of equality is preserved in the subsequent provision of this clause of the will which distributes the share of the daughter dying before his wife. He there directs, upon the death of his wife in case she should survive either of his daughters, that the share which was held in trust to provide for the annuity to

be paid to his wife should be divided "in equal portions unto and among the issue (if any) of the daughter so having died before my said wife; or, if she shall have left no issue who shall survive my said wife, then to my other daughter, if then surviving, or in equal portions, to her issue, if she shall have died leaving issue then surviving." Thus, the predetermining intent in this will is equality among his grandchildren; and that same idea of equality is continued in the succeeding clause which provides for his wife dying before either of his daughters. In that case, upon each daughter's death he devises and bequeaths the share held in trust for her in equal portions unto her then surviving issue, if any, or, if no issue shall then survive, that her share shall be added to the share then held in trust for his other daughter if she then survive, and if not then the testator gives the same, that is, the principal, in equal portions to her issue if any then survive. As before stated, the controlling intention all through this will is equality. And this equality is not taking all the descendants of the daughter as a class, no matter what their degree of relationship should be to the testator, but equality among the children of his daughter, leaving their descendants to take the share of the parent dying before the death of the life beneficiary. It certainly would not be equality to give seven shares to one granddaughter having six children and one share to a granddaughter having no children, and such a construction would seem to defeat what is to me the controlling intention as expressed in this will. It may be that in this construction of the will an intention to confine this distribution *per stirpes* rather than *per capita* has gone beyond any reported case, but after examination of a great many wills I am clearly of the opinion that to give to the word "issue" a construction that would include all descendants, whether their parents were living or not, has resulted in a distribution of estates which has really been contrary to the testator's intention and which has really

worked great injustice among a testator's descendants; and so I think, in construing such a will, that equality means, not equality of all descendants, but equality in the branches into which the person's family are naturally divided. The testator leaves his estate to his grandchildren subject to a life estate in a child. The natural division is among the grandchildren who survive the life beneficiary. It is not to the descendants of those grandchildren while the grandchildren are alive. And while he contemplates the possibility of the death of a grandchild leaving descendants, and desires that such descendants shall also be included, it seems to me, where equality is provided and is the predominating intent, that it is only in the case of the death of the grandchildren that the grandchildren's issue should be included. And thus in the study of this will I cannot avoid a feeling that this was what the testator intended by equality, and not such inequality as would result from a division of this share among all the descendants of a grandchild where the grandchild was still alive. The extension of this rule that "issue" is synonymous with descendants creates no hardship where all of the descendants are of the same degree of relationship to the testator; it creates a great inequality where all descendants take equally, irrespective of their relationship to the testator, and it is this inequality which would result from the affirmance of the decree of the learned surrogate which I think we should prevent.

If these views are adopted it would result in a modification of the decree by determining that the share of the Countess d'Arschot is to be distributed among the issue of her sister *per stirpes*, and as thus modified affirmed, with costs to all parties appearing on this appeal payable out of the estate.

LAUGHLIN, CLARKE and SCOTT, JJ., concurred; DOWLING, J., dissented.

DOWLING, J. (dissenting).—The primary and technical meaning of the word “issue” is equivalent to “descendants,” and this meaning does not give way to any modification or limitation in the absence of a clear intent upon the part of the testator to give it another meaning. Decedent’s will was a carefully drawn document which gives every evidence of the utmost deliberation and caution in its preparation, and of a careful use of the appropriate legal terms by its draftsman. I can find in it no such expression of a clear intention by the testator to limit the meaning of the word “issue” as would bring it outside of the ordinary rule. I, therefore, am in favor of the affirmance of the decree appealed from.

Decree modified as directed in opinion, and as modified affirmed, with costs to all parties appearing, payable out of the estate. Order to be settled on notice.

NETTIE RAUGHT, Respondent, v. ALBERT G. WEED and EVERETT F. WARRINGTON, as Administrators with the Will Annexed, etc., of ROLAND D. JONES, Deceased, Respondents, Impleaded with ROLAND JONES SHANKLAND MARSH and Others, Appellants.

(*Supreme Court, App. Div., First Department, December 3, 1915.*)

WILL—ACTION TO REVOKE PROBATE UNDER SECTION 2653A OF CODE OF CIVIL PROCEDURE—ACTION PENDING WHEN SECTION REPEALED, ALTHOUGH SOME PARTIES NOT SERVED—EVIDENCE—EXECUTION OF WILL—EXAMINATION OF SUBSCRIBING WITNESS.

An action under section 2653a of the Code of Civil Procedure to revoke the probate of a will may be considered as pending at the time of the repeal of said section, within the meaning of section 2771 of said Code, as amended by chapter 443 of the Laws of 1914, although some of the defendants were not served with a summons and complaint until after the repeal went into effect.

In an action under section 2653a to revoke the probate of a will upon the ground that its execution was fatally defective, it appeared that the will was written by the decedent, contained the proper attestation clause, was signed at the end by the testator and two witnesses, and was found upon the death of the testator in his safe deposit box about six years after its execution, and that the evidence of the only surviving witness was contrary to statements in his affidavit upon which the will was probated. *Held*, on all the evidence, that it was error to direct a verdict for the plaintiff, as a question of fact was presented. Under such circumstances wide latitude should be afforded the attorney cross-examining the only surviving witness, and it is error to exclude answers to questions tending to show interest and bias.

APPEAL by the defendants, Roland Jones Shankland Marsh and others, from so much of a judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of New York on the 6th day of May, 1915, as revokes the probate of a last will and testament and adjudges the same to be invalid, and also from an order entered in said clerk's office on the 5th day of May, 1915, denying appellant's motion for a new trial made upon the minutes.

C. Lansing Hays, guardian *ad litem*, for the infant appellants Marsh.

Edward D. Dowling, guardian *ad litem*, for the infant appellant Roland D. J. Raught.

William Murray, for the plaintiff, respondent.

William A. Campbell of counsel (Charles J. McDermott, attorney), for the respondent Weed.

CLARKE, J.— This is an action brought under section 2653a of the Code of Civil Procedure to revoke the probate of the last will and testament of Roland D. Jones, which was admitted

to probate by the Surrogate's Court, county of New York, October 29, 1913, upon the petition of the plaintiff herein, who was the sister and the sole living adult next of kin of the decedent. The will was entirely in the handwriting of the decedent, and is as follows:

" HOTEL ROLAND,
" Fifty-ninth Street,
" Between Madison and Park Avenues,
" NEW YORK, *June 25, 1907.*

" Be it remembered, that I, Roland D. Jones, of the City of New York, in the State of New York, Esquire, do make this my last Will and Testament, in manner as follows, that is to say —

" I order and direct that all my just debts shall be paid with convenient speed. I give to my sister, Nettie Raught, Ten thousand dollars.

" All the residue of my estate, real, personal and mixt, wheresoever it may be found, and of whatsoever it may consist, I direct a trust fund shall be formed of it and held in trust until the youngest child of my two sisters is thirty-five years of age.

" I direct that all the interests, income and rentals of each years shall be paid to the children of my deceased sister Meta M. Marsh, and of the children of my sister Nettie Raught, each share and share alike equal division after the expenses of the trust are paid.

" I direct that after the youngest child of my deceased sister Meta and of my sister Nettie reaches the age of thirty-five then the trust fund and all the rest of my estate be divided in equal division, of share and share alike, for the children of my sisters, Meta and Nettie and I give and devise unto each of them, to hold to him and to her forever. By the youngest child is meant the youngest one that is in both families collectively.

"I direct that the trustees of the said trust fund shall hold all my real estate to the end of the trust fund or until its termination, with the moneys from all other sources. I direct them to invest the said moneys in any securities which are allowed by the law. All taxes and repairs to real estate must be paid for before the net income is divided.

"In witness whereof, I the above named testator have hereunto set my hand and seal this the twenty-fifth day of June, in the year of our Lord, Nineteen hundred and seven, 1907.

"ROLAND D. JONES. [L. s.]

"Then and there signed, sealed and published by Roland D. Jones the testator as and for his last will, in the presence of us, who, at his request, in his presence and in presence of each other, have set our names as witnesses.

"Witness: W. R. BRUYERE, [SEAL]

"Witness: B. A. BLOCK. [SEAL]"

Roland D. Jones was a physician in New York City. He died September 25, 1913. The two defendants, Roland Jones Shankland Marsh and Lillian Meta Marsh, were infant children of a deceased sister, Mrs. Marsh, and Roland D. J. Raught, defendant, is the infant son of the plaintiff. The will was admitted to probate upon the affidavit of Walter R. Bruyere, verified before the assistant to the surrogate on the 17th day of October, 1913. This affidavit sets forth that affiant "was acquainted with Roland D. Jones now deceased. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as his last will and testament, and bearing date of the 25th day of June, in the year one thousand nine hundred and seven was made by the decedent at the City of New York on the 25th day of June, in the year one thousand nine hundred and seven, in the presence of myself and B. A. Block, the other subscribing witness.

"At the time of making such subscription the said decedent declared the said instrument so subscribed by him to be his last will and testament; and I thereupon signed my name as a witness at the end of said instrument, at the request of said decedent, and in his presence.

"The said decedent at the time of so executing said instrument, was upwards of the age of twenty-one years, and in my opinion of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will. I also saw said B. A. Block, the other subscribing witness sign his name as a witness at the end of said will, and know that he did so at the request and in the presence of said decedent. I knew said decedent for seventeen years before the execution of said instrument."

The will not having appointed any executors or trustees, the court appointed Albert G. Weed and Everett F. Warrington administrators with the will annexed. Two administrators were appointed in view of the different interests of the Raught and Marsh families. Nettie Raught signed and acknowledged on November 25, 1913, a consent to the appointment of Albert G. Weed, "and to such other person as may be selected by the said Albert G. Weed to act as trustee or trustees to administer, execute and carry out the trust created by and existing under the last will and testament of Roland D. Jones, deceased, and do hereby waive the issue of a citation or other notice to me. This consent is given without prejudice to my right to contest the validity of said alleged trust."

The court in this case by order permitted the administrators to appear and answer separately which they have done. The summons and complaint were served on March 10, 1914, on the defendants Weed and Warrington; the infant defendants were served in November, 1914. The Code of Civil Procedure was amended by chapter 443 of the Laws of 1914 enacting the present Surrogates' Code, and section 2653a was repealed. The

repeal went into effect on September 1, 1914. At this time the infant defendants Marsh had not been served with a summons and complaint in the action. A saving clause was contained in the new Surrogates' Court Act which reads:

"§ 2771. Effect of this chapter on laws applicable to certain counties. Nothing in this chapter shall repeal, amend or modify any existing law specially applying to any county, which is inconsistent with any section of this chapter nor in any manner affect any litigation, action or special proceeding pending at the time when this act takes effect, and such pending action or special proceeding shall proceed under the practice established, the same as though not affected by this act." (See, also, Laws of 1915, chap. 274, amdg. said § 2771.)

This provision is State wide. (Matter of Iovinella, 166 App. Div. 460.)

The point is made that this action could not be considered as pending at the time of the repeal of section 2653a because the infant defendants had not then been served with a summons and complaint, and, therefore, that the Supreme Court had no jurisdiction, but the issue should have been tried out in the Surrogate's Court. The court below overruled this contention, and I think properly so. The action was brought under the provisions of law then existing and it was pending at the time of the repeal although all of the parties had not been served.

Plaintiff claims that the execution of the will was fatally defective. The will was written by decedent, contained the proper attestation clause and was signed at the end by the testator and two witnesses, B. A. Block, who predeceased the testator, proof of whose handwriting was given on the trial, and Dr. Walter R. Bruyere, a physician and associate of the testator for many years.

Upon the death of the testator the instrument was found in his safe deposit box. Mrs. Raught and Dr. Bruyere were present at the opening of the box, and the will was found and

read in the presence of the plaintiff and others, and was, on September 30, 1913, filed in the office of the surrogate.

On the main question of the execution of the will Dr. Bruyere testified that he had been associated with Dr. Jones for several years; that his signature was on the will; that Mr. Block's signature was there below his and that he saw Mr. Block sign; that he was asked to put his signature on that paper by Dr. Jones; that he put this paper on the table and asked him to sign there as a witness, and he did; that he said nothing further at that time. Then he wanted to get Mr. Block, and he took the paper out with him and went out and got Mr. Block. He said to Mr. Block: "I want you to sign here as a witness." Mr. Block then signed. The doctor took the paper and folded it up and put it in his pocket and went out. The witness said he did not read a word of the paper, and that Dr. Jones did not say a word to him nor to Mr. Block about the paper; that he had never been a witness to a will at any other time, and did not know anything about the requirements of law as to the making of a will.

Under cross-examination he said that the paper offered looked like the paper he signed at that time. It was signed by a man by the name of Block. He never signed any other paper with Block, so that must be the one. The doctor's name did not show. There was some writing there at the bottom but he did not read it. He had it folded under so you could not see his name; that he had signed papers for the doctor before; not so frequently, several times. He had signed them for the doctor without looking at them half a dozen times.

"Q. Doctor, you testified you had never witnessed a will before, didn't you? A. Yes, I believe so. Q. Isn't it a fact that you did witness a will of the Doctor's some years before? A. Might have been. Might have— I think I did witness a will for him in 1893. I believe he said it was his

will. Q. He asked you to sign it, didn't he? A. Yes. Q. He signed it in your presence, didn't he? A. No, I didn't say that. I signed it in his presence, what it was I don't know. Q. He acknowledged it was his will? A. He said he wanted me to sign as a witness to his will." He was then asked: "Q. What was your position in this hotel, Doctor? A. I was the doctor's helper in his medical practice; was there as his associate for years, helped him with his practice — patients. Q. You also assisted in the running of the hotel, didn't you? A. Very little; I hadn't much to do with the hotel. Q. You made out the payrolls, didn't you? A. Yes, I was treasurer of the company and took charge of the money. * * * Q. Have you got a claim against this estate? Mr. Murray: I object to that also. (Objection sustained — exception.) * * * Q. Dr. Jones was a rheumatic specialist, I think you have testified? A. He was. Q. He had a secret cure for rheumatism, didn't he? A. I don't know about that. Q. You feel rather bitterly towards Dr. Jones, don't you? A. No. Q. Doctor, didn't Dr. Jones promise to give you his formula, his rheumatic remedy? Mr. Murray: I object to that. The Court: Objection sustained. * * * Q. When you signed this paper you did not know whether it was a deed to property? A. I didn't know what it was. Q. Didn't know whether it was a general release? A. I didn't know."

In regard to his affidavit before the surrogate's assistant at the time the will was admitted to probate he says that he "looked it over and signed it. Then we went over to a desk and some man asked me some questions and I swore to it."

The court, while it went through the form of leaving the question to the jury, as a matter of fact, directed a verdict for the plaintiff. He undertook to leave certain questions to them, but he directed the answer to each one of them and then said: "I have said that all those questions are to be answered by you in the negative. Let me modify that instruction to this

extent, if you shall find that Dr. Bruyere's evidence is not to be credited as he gave it to you on the witness stand to-day, but on the contrary the deposition which he swore to and signed at the time when the will was admitted to probate is accepted by you as the true version of what occurred at the time of the execution of the will, then you may answer each and every one of these questions in the affirmative."

He then refused to charge a request couched in the language of section 2612 of the Code of Civil Procedure (as amd. by Laws of 1914, chap. 443). He declined to charge that the testator must be presumed by the jury to have known the requirements of law for the valid execution of a will. He declined to charge "that the fact that this will was found in the safe deposit vault of the testator is a very important consideration on the issue of fact of the will being his last will and testament." He declined to charge "that the fact that this will was in the handwriting of the testator is strong indication of the fact that the will was his will." I do not think appellants had a fair trial. There was a question of fact. In support of the proposition that the will was duly executed there were the facts that it was in the handwriting of the decedent, signed by him at the end thereof with a proper attestation clause, with two witnesses thereon whose signatures were proven; that it was found upwards of six years after its execution in the safe deposit vault of the testator; that at the time of probate a subscribing witness had verified an affidavit before the surrogate's assistant containing facts which fully warranted the admission of the instrument to probate and had answered questions thereon; that this witness upon the stand a year and a half thereafter, and seven years and nine months after the date of the instrument, and without a clear identification of the time of the execution thereof while testifying to the fact that he and the other witness had each been requested to sign the document as a witness by the testator said that no other words were said by him

and that he did not declare the instrument to be a will or acknowledge his signature thereto, and yet this witness having also sworn that he never had witnessed any other will and that he did not know that this was a will at the time he witnessed it, subsequently, under cross-examination, admitted that he had witnessed a will for the decedent in 1893 and that on that occasion the decedent had said it was his will and that he wanted him to sign as a witness to his will and that he signed in his presence. Under these circumstances wide latitude should have been afforded to the cross-examiner and it was error not to permit the questions propounded to the witness, tending to show interest and bias, to be answered. And the question of fact should have been fairly presented to the jury instead of a verdict being in effect directed.

In *Wyman v. Wyman* (118 App. Div. 109; *affd.*, 197 N. Y. 524) this court upheld a will which two subscribing witnesses attempted to destroy, they both having testified that at the time they signed the paper they did not know it was a will; that the signature of the decedent was not upon it when they signed it; that their signatures were not made in the presence of each other, and although each swore he signed at the request of the decedent, at the time of the signing he did not declare it to be his last will and testament. That will, like this, was in the handwriting of the decedent, contained an attestation clause, and was found after the testator's death in his safe. We cited *Matter of Cotrell* (95 N. Y. 329), where there was also a holographic will, but where the two witnesses purporting to have signed that will as subscribing witnesses not only testified that none of the formalities required by the statute were complied with in its execution in their presence, but also positively denied that either of them was present at its execution or signed the attestation clause. Yet, nevertheless, the will was sustained.

In *Matter of Sizer* (129 App. Div. 7) from the date of the

will to the hearing on the probate was eight years and seven months. The first and second witnesses testified that they had no recollection of signing the will, or of being asked to, or of anything connected with it, but acknowledged their signatures to be genuine. The third witness testified that the testator came to his house and asked him to go across the street to his drug store and witness his signature, and that he went and signed a paper under the names of the two preceding witnesses; that he did not know what the paper was and that the testator did not say. He did not give the date of this occurrence; how long it was after the other witnesses signed, or even if it was the same day. This will was also holographic. The opinion cites a large number of cases and the Appellate Division, Second Department, unanimously upheld the will.

In *Matter of Abel* (136 App. Div. 788) the will did not contain a formal attestation clause and all three of the subscribing witnesses were dead and the ground of attack was that the evidence presented to prove the will did not make out even a *prima facie* case of due execution under the statute. But nevertheless the will was sustained. The court said among other things: "All the authorities, however, agree that the existence of an attestation clause is one of the circumstances attending the execution of the will from which arises a very strong inference of fact that due execution was had, the underlying reason being that all persons are presumed to know the contents of what they sign and are likewise presumed to sign in good faith. Thus, when a signed attestation clause is found on a will, and recites due execution, that fact is deemed a basis for a strong inference that there was an execution of the will according to the recitals."

I think there was a question of fact which was not fairly presented and that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellants to abide the event.

INGRAHAM, P. J., LAUGHLIN, SCOTT and SMITH, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellants to abide event.

SILAS DECKER and JOHN V. DECKER, Appellants, v. CARRIE M. VREELAND and Others, Individually and as Executors, etc., of CONRAD VREELAND, Deceased, Respondents, Impleaded with JACOB R. DECKER and Others, Defendants.

(Supreme Court, App. Div., Second Department, December 17, 1915.)

DECEDENT'S ESTATE—DEVISE TO INDIVIDUALS IN PERPETUITY FOR CHARITABLE USE—DEVISE EXCEEDING ONE-HALF OF TESTATOR'S ESTATE—DECEDENT ESTATE LAW, SECTION 17, CONSTRUED.

A devise to trustees in perpetuity, the income to be applied to the maintenance of churches, ministers and missionaries of a certain religious denomination located within certain counties, does not offend section 17 of the Decedent Estate Law, although the gift exceeds one-half of the testator's estate.

Said statute limits the amount of devises and bequests only where the gift is to the charitable institution itself, or, *it seems*, to trustees who are to turn over the corpus to such charitable institution. The statute does not apply to a devise to individuals for charitable uses.

APPEAL by the plaintiffs, Silas Decker and another, from a judgment of the Supreme Court in favor of the respondents, entered in the office of the clerk of the county of Kings on the 24th day of March, 1915, dismissing the complaint upon the decision of the court after a trial at the Kings County Special Term in an action for partition.

Merle I. St. John, for the appellants.

William D. McNulty, for the respondents Walter D. Hoag and others.

PUTNAM, J.—Plaintiffs, being respectively the husband and son of Jane E. Decker, testator's sister, sue here for the construction of Conrad Vreeland's last will, made and probated in New Jersey, where the testator resided up to his death in June, 1913. He died seized of real estate in New Jersey worth \$52,590 and possessed of personalty there amounting to \$47,000. He left realty in the State of New York worth \$41,300. He had no debts; and his funeral expenses were less than \$1,000. He left no descendants, but was survived by a widow, Carrie M. Vreeland (a defendant), and the plaintiff John V. Decker, with certain other defendants, his heirs at law and next of kin.

His will gave his widow the household furniture, live stock and farming utensils, also in lieu of dower she received an annuity of fifty dollars a month. He disposed of the residue as follows:

“Item fourth. Subject to the foregoing bequests and devises I give, devise and bequeath unto my executors, hereinafter named, but nevertheless in trust, all my real and personal estate of every kind whatsoever and wheresoever the same may be found to which I may die seized; my said executors or trustees to hold said estate and not to encumber the real estate in any way whatsoever, but to keep it in good condition and repair, and to keep the funds of my estate properly invested in bonds and mortgages, and to use the income derived therefrom in the following manner: To pay the North New Jersey Baptist Association all the income derived from my estate for and towards the maintenance of the churches, ministers and missionaries of the Baptist denomination, and for the erection of regular Baptist Churches, which are presided over by regular Baptist ministers only, and for the payment of salaries of said ministers or missionaries only; but no minister presiding over any of said churches to receive out of said income any sum in excess of three hundred dollars as salary in any one year. I

hereby empower my executors and trustees to sell and give title to any real estate I may own at my decease. Any church receiving any benefit under this, my last will and testament, to be supplied with a minister who shall hold service in such churches at least once on each Sabbath day, weather permitting. Said income to be applied only to the support, erection and maintenance of churches in the manner aforesaid, in the Counties of Passaic, Bergen, Morris and Sussex, in the State of New Jersey, and which are not located within the limits of any incorporated city in said counties.

"Item fifth. I hereby nominate and appoint my wife, Carrie M. Vreeland, Walter D. Hoag and George C. Freeland executors and trustees of this, my last will and testament. I hereby order and direct that the trustees of this trust hereinafter created, shall consist of three persons, and in the event of the death or resignation of any of the above named three trustees or their successors that said vacancy or vacancies shall continue until the next annual meeting or conference of the North Jersey Baptist Association, at which time a trustee shall be selected for each such vacancy or vacancies in the same manner as the association selects its other officers."

By the 4th clause the residuum of the estate, which constitutes practically the entire estate, is to be held perpetually by the trustees named, and those who shall succeed them, in trust for the benefit of named beneficiaries, to wit, an association of Baptist churches, and ministers and missionaries of the Baptist faith.

Plaintiffs maintain that this devise and bequest falls within section 17 of the Decedent Estate Law (Consol. Laws, chap. 13; Laws of 1909, chap. 18), and entitles the heirs at law and next of kin to the excess above one-half of the estate.

Section 17 of the Decedent Estate Law provides: "No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevo-

lent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more." (Originally by Laws of 1860, chap. 360.)

This statute, being a limitation upon the right of a testator to dispose of his property, is not to be applied to a devise or bequest, unless such gift comes plainly within the statutory limitation.

These residuary devises and bequests, although charitable, are not to a "society, association or corporation, in trust or otherwise," but are to trustees, upon whom the testator has conferred active powers and duties to keep and preserve the realty, with the power to sell the same, and to keep the funds of the estate invested in bonds and mortgages, and to use the *income* towards the maintenance of certain churches, ministers and missionaries of the Baptist denomination. This is clearly a devise to individuals for charitable uses, and not within the purview of the statute of 1860. (*Allen v. Stevens*, 161 N. Y. 122.) The property is permanently in the trustees, the income to be used for specific purposes. Where the trustees named are to turn over the subject of the trust to charitable corporations, such beneficiaries are virtually legatees, and a different rule applies. (*Jones v. Kelly*, 170 N. Y. 401.) Our Legislature did not design to prevent income as such from going to charitable purposes. Such gifts are not subject to our statutes against perpetuities. (*Matter of Shattuck*, 193 N. Y. 446, 450, and cases cited.) Mr. Vreeland's will directs the trustees named to execute, themselves, a continuing trust, and vests in the trustees a lasting title to the property so devised.

The equities are with the designated beneficiaries. The testator left no child, grandchild or parent. The widow, who was the only one holding a relation to the testator to benefit

by the statute, approved this testamentary trust, and asks that it be sustained. Plaintiffs, who had no legal claim upon the testator's bounty, should, therefore, be held to their strict legal rights.

I advise that the judgment in favor the defendants be affirmed, with costs.

JENKS, P. J., THOMAS, CARR and STAPLETON, JJ., concurred.

Judgment affirmed, with costs.

EDWIN T. CORNELL, Respondent, v. LILLIAN R. CHILD and FLORENCE C. KENT, Respondents, Impleaded with CHARLES PURDY and Others, Appellants.

(*Supreme Court, App. Div., Second Department, December 17, 1915.*)

REAL PROPERTY—DESCENT—DECEDENT ESTATE LAW—DESCENT OF BROTHER OF THE HALF BLOOD WHO IS ALSO COUSIN BY MARRIAGE OF ANCESTOR WITH DECEASED WIFE'S SISTER—"ANCESTOR" DEFINED.

The half brother of an intestate, who is also her cousin by reason of the fact that the intestate's father married his deceased wife's sister, and also the descendants of the deceased half brother, being nieces of the half blood, are "of the blood" of the intestate and inherit her real estate to the exclusion of other cousins who are descendants of a deceased aunt of the intestate.

Where a sister inherits lands from her brothers "they are ancestors" from whom the estate is derived within the meaning of section 90 of the Decedent Estate Law, and the lands so inherited by the sister descend to her brother of the half blood and to the descendants of a deceased brother of the half blood under the circumstances aforesaid.

APPEAL by the defendants, Charles Purdy and others, from a judgment of the Supreme Court in favor of the respondents, entered in the office of the clerk of the county of Westchester

on the 15th day of March, 1915, upon the decision of the court after a trial at the Westchester Special Term in an action for partition.

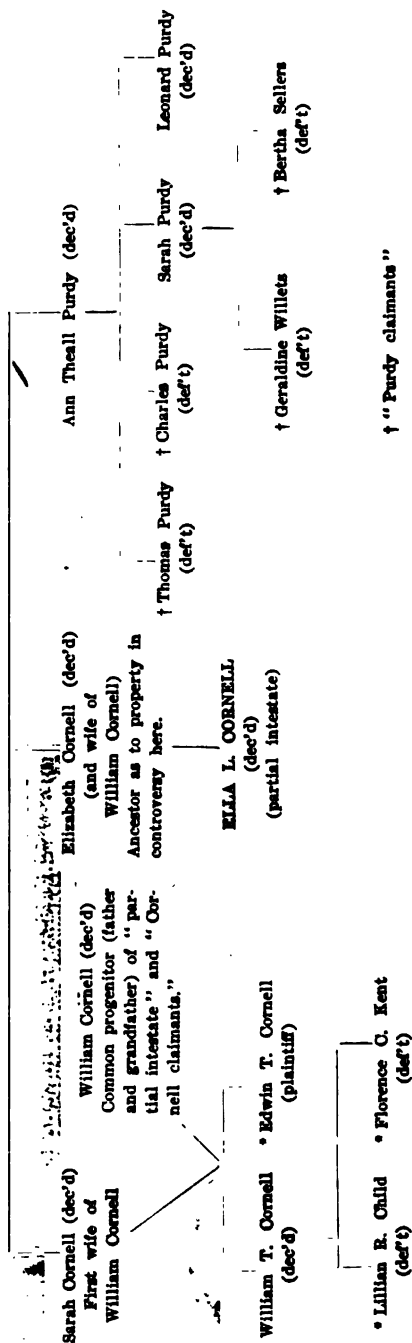
Eben H. P. Squire, for the appellants.

Burton C. Meighan, for the respondents.

PUTNAM, J.—The rights of the descendants of three sisters, Sarah, Elizabeth and Ann Theall, are here involved. Mr. William Cornell first married Sarah, by whom he had two sons, William T. Cornell (who in 1907 deceased, leaving as only issue Lillian R. Child and Florence C. Kent) and Edwin T. Cornell, the plaintiff herein. After Sarah's death, Mr. William Cornell married as his second wife Elizabeth Theall, by whom he had three children, Fred L. Cornell, Frank S. Cornell and a daughter, Ella L. Cornell. Mrs. Elizabeth Cornell was seized of the lands here in question. She died in 1892, intestate, so that the lands subject of this suit for partition descended to her three children aforesaid, each having a third interest, as tenants in common. These children have now all died. Ella's interest became increased by devise and descent from her brothers. By lapse of certain provisions of the will of Ella Cornell, a case of partial intestacy has arisen as to one-half of her residuary estate. The respondents claim that this inheritance passed to her brother of the half blood, plaintiff Edwin T. Cornell, with her nieces of the half blood, Lillian R. Child and Florence C. Kent, daughters of the deceased half-brother Williams T. Cornell, between whom there is entire agreement.

The descendants of Ann Theall, by her marriage with Thomas Purdy, also claim an equal share in the property as to which Ella L. Cornell died intestate. This family relationship is shown by the following diagram:

FULL SISTERS



The learned court at Special Term has found and determined that the plaintiff Edwin T. Cornell, and the defendants Lillian R. Child and Florence C. Kent, inherit the property which descended to Ella L. Cornell directly from her ancestor Elizabeth Cornell, as to which Ella L. Cornell died intestate. This is through their kinship of the half blood, under the provisions of the Decedent Estate Law (Consol. Laws, chap. 13; Laws of 1909, chap. 18). Obviously, if they do so inherit, the descendants of Sarah Purdy being cousins are excluded from any right in the property under rule 4 of descents. (Fowler Real Prop. [2d ed.] 864, 866.)

It is not questioned that these respondents whom, for brevity, counsel have described as the "Cornell claimants," are nearer in degree than those called the "Purdy claimants," if the half blood here stand equally with the whole blood. But it is urged that a different rule applies as to this landed interest which the intestate has inherited from her mother under the exception as to ancestral property by Decedent Estate Law (§ 90) which provides: "Relatives of the half blood and their descendants shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance." This re-enacts former Real Property Law (Gen. Laws, chap. 46 [Laws of 1896, chap. 547], § 290), taken from section 15 of chapter 2 of part 2 of the Revised Statutes (1 R. S. 753, § 15).

By the term "ancestor" when used in respect to the succession to real estate, is meant a predecessor in estate, and is applied to every person from whom property might be inherited. It embraces both lineals and collaterals. (*McCarthy v. Marsh*, 5 N. Y. 263.) The novelty is in the dual relationship through marriage of sisters to the same husband. When such a situation arose before the New Jersey Supreme Court in 1826, where like competing rights resulted from the marriage with sisters,

Mr. Justice FORD said: "The present case of a man marrying two sisters forms an anomaly; the issue of *such* a marriage, disposed of in *such* a form, may not occur again in a century." (Den on demise of Delaplaine v. Jones and Searing, 3 Halst. [8 N. J. L.] 340, 355.) But in the present case this double kinship solves all difficulty, and under our statute furnishes an undeniable blood relationship.

The term "of the blood" as here used, does not indicate the quantity, but simply that there is some of the blood, whether the whole, or the half, or a smaller portion. (Beebee v. Griffing, 14 N. Y. 235.) As to a part of the interest of the intestate, her brothers Fred and Frank are to be deemed "ancestors," while as to the portion which Ella inherited from her mother Elizabeth, the mother is the ancestor, as the inheritance was direct to the daughter. The brother and nieces of the intestate by the half blood (the Cornell claimants) are to be deemed "of the blood" of Elizabeth Cornell, under the rule that "all are of the blood of an ancestor who may in the absence of other and nearer heirs take by descent from that ancestor" (2 Black. Com. 220), a holding which does not take the inheritance out of the family. Such a conclusion is supported by Gardner v. Collins (2 Pet. [U. S.] 58; Den on demise of Delaplaine v. Jones and Searing (8 N. J. L. 340); Wheeler v. Clutterbuck (52 N. Y. 67); Banes v. Finney (209 Penn. St. 191). Our public policy is against the feudal exclusion of the half blood, which doubtless was because by promoting escheats it favored the Crown. (2 Pollock & Mait. Hist. Eng. Law [2d ed.], 305.)

The findings and determination of the learned justice at Special Term accord with the trend of American authority. (Note to Anderson v. Bell, 29 L. R. A. 541, 546.)

I advise that the judgment be affirmed, with costs.

JENKS, P. J., STAPLETON, MILLS and RICH, JJ., concurred.

Judgment affirmed, with costs.

In the Matter of the Probate of a Paper Writing Purporting to Be the Last Will and Testament of ANNIE COE MACDOWELL, Deceased.

WESTCHESTER TRUST COMPANY, as Executor, etc., of ANNIE COE MACDOWELL, Deceased, Proponent, Respondent, Appellant; JESSIE M. GIBSON, Contestant, Appellant, Respondent; EGBURT E. WOODBURY, as Attorney-General of the State of New York, Appellant.

(*Supreme Court, App. Div., Second Department, December 17, 1915.*)

WILL—EXECUTION—SIGNATURE OF TESTATRIX—DEVISE TO TRUSTEES IN PERPETUITY—LIMITATION OF INCOME TO USE OF PERSONS SPECIFIED—WHEN OBJECT OF PERPETUAL TRUST NOT CHARITABLE—UNLAWFUL SUSPENSION OF POWER OF ALIENATION.

Appeal from a decree of the Surrogate's Court admitting a will to probate. The probate is attacked on the ground that the instrument was not signed by the testatrix at the end thereof, as required by the statute, and that the nature of the will together with the testimony of physicians showed that the testatrix lacked testamentary capacity.

The will in substance conveyed the entire estate of the testatrix to trustees in perpetuity, income to be devoted to the founding of a home for refined gentlewomen of small means "whose home is made unhappy, by having to live with Relatives, who think them in the way." The testatrix provided that certain specified persons, relatives and others, and the descendants of said persons, should forever have the preference of being inmates of said institution. Evidence examined, and

Held, that the due execution of the instrument, which was entirely in the handwriting of the testatrix, was sufficiently established;

Held further, that the trust in perpetuity was invalid in that the testatrix did not intend to devote the income to a public charity as permitted by the statute, but, on the contrary, so limited the use of the proposed institution to her relatives and others that it in effect created a perpetual foundation limited to the issue of named individuals and so was offensive to the statute against perpetuities.

MILLS and RICH, JJ., dissented in part, with opinion.

APPEAL by Jessie M. Gibson, contestant, from so much of a decree of the Surrogate's Court of the county of Westchester,

entered in the office of said Surrogate's Court on the 27th day of July, 1914, as admits a certain paper to probate as the last will and testament of Annie Coe MacDowell, deceased.

Appeal by Westchester Trust Company, as executor, and another, from part of a decree of the Surrogate's Court of the county of Westchester, entered in the office of said Surrogate's Court on the 26th day of March, 1915, as decrees that a certain trust created by the said will is invalid.

By the writing admitted to probate the decedent made the following disposition:

"I give and bequeath to my Executor and Trustee, here in after named; all my portion of my Father's Estate, now held in trust for me, under his last Will; and which portion I have under his last Will, the right to bequeath, and in addition, all my own money, which is now in Bond & Mortgages, & Five Savings Banks — amounting to about Ten Thousand Dollars — To be well invested, and the Income derived from both, to be used for hiring a House, and maintaining same, in a respectable neighborhood, within the City limits of Yonkers, New York — To be used as a Home for Refined, Educated *Protestant*, Gentlewomen — whose means are small — and whose home is made unhappy, by having to live with Relatives, who think them in *the way* —

"This Home to be called the 'Mary Randol, Memorial Home' — I wish the preference of being an Inmate of this Home, to be given to my Sister Jessie, and my Cousins, and their lineal descendants Forever.

"Namely — Mrs Philip H. Remington — Miss Elizabeth Remington, of Windsor — Conn Miss Bessie Terhune Mr Richard Morrell — Passaic, New Jersey — Mr Harry Masters — Passaic — New Jersey — Mr Enos Randol Hyatt — 277 Broadway — N. Y. — The same privilege is extended to my Friends — Namely — Miss Mary A. Hall — Port Richmond Miss Adelaide Hall — Port Richmond — Staten Island Miss

Inlia Frances Bangs Mrs Enos Randol Hyatt — Miss Annie E. Scott — Washington — Iowa Rev Mrs. George W. Huntington — Newburgh, N. Y. To come and go with perfect freedom, and not confined to rules.

“ All the Inmates of this Home, are to pay board, each week they are there — with their small means — The price not to exceed — Seven Dollars per week — Towards paying the running expenses of the house — which will have a House-keeper at the head —

“ My hope is that my Sister Jessie, will leave her half share of the Estate, to this Home — in memory of our dear Mother — Mary Randol —

“ I ask Mr James G. Wentz, and Mr. Enos Randol Hyatt — to take an interest in this Home — to see that it is properly conducted, and I appoint the Westchester Trust Company of Yonkers — N. Y.— as my Executor, and Trustee — to manage this Estate, and pay the Interest, to a committee of Seven Ladies & Gentlemen, to be chosen by the Board of Vestrymen of St. Johns Episcopal Church of Yonkers — N. Y.— for carrying on this Home — To be established in perpetuity —”

After certain private bequests she mentioned furniture, pictures and other articles for housekeeping, which the testatrix declared: “ I wish to be given towards furnishing the Mary Randol Home — As soon as practicable, after the probate of this my last Will — Should any one wish to leave a Legacy to this Home — I would be glad to have them do so — and should the Home be large enough to accommodate others than those mentioned in this Will — I wish the Committee of Seven Ladies and Gentlemen from St. Johns Church of Yonkers — N. Y.— to admit those Refined Gentlewomen who they judge most — worthy —”

The surrogate held the foregoing trust provision for the “ Mary Randol Memorial Home ” invalid and void.

Daniel S. Remsen, for the proponent.

William W. Scrugham (Graham Witschief with him on the brief), for the contestant.

Robert P. Beyer, Deputy Attorney-General (Egburt E. Woodbury, Attorney-General, with him on the brief), for the State of New York.

PUTNAM, J.— The appeal from the decree admitted to probate was taken by the contestant, the sister of the decedent; and the executor named in the will and the Attorney-General have both appealed from the surrogate's other decree, construing the will and declaring the alleged trust invalid.

Decedent died January 20, 1914, leaving an estate of about \$63,000. She executed, on July 5, 1904, the paper writing which has been admitted as her last will.

On appeal from the decree admitting the will to probate the appellant, the sister of the testatrix, first contends here that the writing was not signed at the end thereof, and, therefore, was not duly executed as a will. On examination of the instrument, which was entirely written by the testatrix, we think the learned surrogate correctly sustained the execution of the will under the authority of *Younger v. Duffie* (94 N. Y. 535). This appellant also contests the testamentary capacity of the deceased.

At her death in 1914 the testatrix was a maiden lady of about seventy years of age; this will was made nearly ten years earlier. She had lived with her father and sister until about 1900, when the sister married, and thereafter the testatrix resided most of the time with her sister, with intervals in boarding houses. At her father's death his estate was practically divided between his two daughters. After 1896 the testatrix had several illnesses, during which for a time she was

melancholy, and would remain speechless. The first attack was from January 7, 1896, to June, 1896; the second from July 26, 1900, to July 5, 1901; the third from May 1, 1907, to December 24, 1910; the fourth from July 10, 1912, to March 15, 1913; and the fifth and final attack from November 26, 1913, to her death, January 20, 1914. It thus appears that the will in question was executed about midway of the six-year interval between the second and third of these attacks.

In answer to hypothetical questions embodying the facts as to her conduct during those attacks, as contestant claimed, four physicians, no one of whom was an expert alienist, each testified that in his opinion she was suffering from depressive melancholia and incapable of making a will.

The theory of the contestant is that through decedent's mental disease she became obsessed with the idea that she was friendless; that she was not welcome at her sister's — where indeed she was welcome; and that out of that obsession she conceived the notion of founding a home, which in the trust provision of the will she attempted to do. There was evidence showing decedent's expressions indicating that she held such views.

Proponent introduced no medical evidence, but relied upon the evidence showing her to have been rational at the execution of the will; that she drew the will herself, and that it shows very exact understanding of the condition of her property and its source, and of her relations to her relatives and friends, mentioning them by name; that she attended to her own business until long after making the will, settling her affairs with the trustee of the will of her father, who died about 1900, and a receipt given by her June 29, 1905, upon such settlement was put in evidence. That trustee testified that her talk and dealings with him at all times were rational. The vice-president and acting official of her bank in Yonkers testified to her dealings at the bank, and that her acts always impressed him as rational.

The husband of the contestant testified that testatrix lived most of the time with them after the spring of 1901; that she often consulted him about her business affairs. It is to be noted that there is nothing in the testimony of this witness to indicate any want of testamentary capacity on the part of the testatrix. Various paper writings by her, such as checks, memoranda of securities received from her father's estate, letters and other writings in her handwriting were put in evidence, all indicating good mental condition. So far as these papers are printed in the record, we fail to find in them anything indicative of want of ordinary mental capacity. After her death, her sister and a friend found many little packages among her effects, each containing some trivial object wrapped up in a paper.

Contestant's counsel contends that the scheme of the will itself, namely, the attempt to found such a home, indicates mental unsoundness. We cannot agree with this view. The idea seems not unnatural for an old maiden lady to entertain, whose only sister had married late in life and left her alone. As human nature goes, it was not strange that she should look upon herself thereafter as neglected, supplanted and left unconsidered.

Therefore, the decision of the surrogate, admitting the paper writing to probate as her last will and testament, cannot here be held to have been against the greater weight of the evidence; and, therefore, it should be affirmed.

The other appeal, namely, that from the decree construing the trust provision of the will and holding it to be invalid, presents more difficulties for our determination. The learned surrogate held that the trust disposition was void for the reason that the provision therein purporting to create preferences, for the testatrix's named relatives and friends, and their lineal descendants, as beneficiaries of the home attempted to be created, made such trust, in part at least, one for a private

use and not for a public charity. Upon this point, in his opinion, he wrote: "If the testatrix had said in the will that the home she desired to found should 'be used as a Home for refined, educated Protestant gentlewomen whose means are small and whose home is made unhappy, by having to live with relatives, who think them in the way' and then had stopped, the so-called trust would have been a charitable one within the statute. * * * The last clause of the will referred to (meaning the clause as to preferences) shows conclusively to my mind that the testatrix intended to prefer these six relatives and their descendants. She also intended to prefer her six friends named. Her intention was to provide a home for these relations and their descendants and her friends to the exclusion of all others. This then would mean that the income of the so-called trust would be devoted, in part at least if not entirely, to a private use. This being so, the entire gift would be invalid." (89 Misc. Rep. 323.)

We agree with the learned surrogate that the scheme of the proposed home is against the rule forbidding perpetuities, unless it may stand as a charity. Here, however, the intended beneficiaries are not the poor and needy, but persons described of relatively small means, "whose home is made unhappy, by having to live with Relatives, who think them in the way." How is that inhospitable and rude family attitude to be shown? Yet to this vague plan the income of \$63,000 is devoted. But the beneficial scheme is not for the public, or for those of a locality. It is tied by many preferences, not to the descendants of the founder, but to a considerable outside field. The testatrix preferred her sister and six of her cousins (of whom three are men) and their lineal descendants forever, and extended the same privilege to six other women named, making in all thirteen stocks with their descendants. Thus the preferences may readily absorb the purposes of the foundation, leaving nothing from this moderate income for outside aid.

And this preference is not to the needy relatives, friends or their descendants, but any of such description whose means are "relatively" small. It is not to relieve poverty or sickness. It aims at a perpetual private foundation, limited to the issue of named individuals. The disposition, therefore, has not the public purpose which the law and policy of this State require. Speaking of our present statute, the Court of Appeals says: "Gifts for the benefit of private institutions or individuals were not intended to be included within its provisions." (*Matter of Shattuck*, 193 N. Y. 446, 452.)*

I advise that the surrogate's decree of July 17 (27), 1914, admitting the will to probate, and his further decree of March 26, 1915, adjudging invalid the trust attempted to be created under said will, be severally affirmed, with a single bill of costs to the executor and one bill of costs to the contestant payable out of the estate.

CARR and STAPLETON, JJ., concurred; MILLS, J., dissented, in separate opinion, from the affirmance of the surrogate's decree holding the trust clause invalid, but concurred in affirming the decree which admitted the will to probate, with whom RICH, J., concurred.

MILLS, J. (dissenting).—I find myself unable to agree with the views expressed in the majority opinion as to the appeal from the decree construing the trust clause.

As it seems to me, the controlling point in those views, as therein expressed, is that the provision in such clause, as to preferences, must be construed as preferring the thirteen individuals mentioned, and their lineal descendants, absolutely,

* See Laws of 1893, chap. 701, as amd. by Laws of 1901, chap. 291; now in part Pers. Prop. Law (Consol. Laws, chap. 41; Laws of 1909, chap. 45), § 12, as amd. by Laws of 1909, chap. 144.—[RE.]

without any specified qualification upon their part save that of being persons whose means are relatively small. At least such opinion quotes, with apparent approval, an excerpt to that effect from the opinion of the learned surrogate, and further declares: "Thus the preferences may readily absorb the purposes of the foundation, leaving nothing from this moderate income for outside aid." The gist of this view appears to me to be that the persons of the preferred class are not required to have the general qualifications imposed by the trust clause upon other beneficiaries of the trust.

I disagree entirely with the learned surrogate and with the majority opinion as to the true construction of the preference clause. I think that it is to be construed as requiring the persons so preferred to have the qualifications previously specified for the general class of beneficiaries.

As to the sister Jessie, I see no inconsistency in the later statement of the will to the effect that she had means, because it would be no strange thing in our American life for such sister even to come to be without means or to have merely small means; and as to the three men mentioned, it must be noted that to the first general mention of the persons to be preferred the clause added the words "and their lineal descendants Forever." It seems to me that as to the men, the obvious meaning is that their female descendants of the general class are to be so preferred, not that they themselves are to be. It seems, at least to me, quite unnatural and indeed forced to construe the language of a person, whom we have held capable of making a will, to mean that three men should be entitled to become members of a home which she designed to create "for Refined, Educated, *Protestant*, Gentlewomen," if any other construction may possibly be had. I recall that in a most charming work of recent fiction, entitled "Old Lady Number Thirty-one," is to be found an instance of such male membership, but have never heard of any such in real life.

As to the apprehension expressed in the majority opinion that "the preferences may readily absorb the purposes of the foundation, leaving nothing from this moderate income for outside aid," I think that it is groundless. With the preference clause construed as I have above suggested, it may well be that in a given generation no one person of any of the thirteen stocks mentioned will be able to qualify as a beneficiary.

It is a familiar doctrine, which has had recent utterance by the Court of Appeals in a similar case, that where such a challenged clause is susceptible of two constructions, one of which will sustain the provision as a valid public charity and the other of which will make it void, the former construction will be adopted. (*Matter of Robinson*, 203 N. Y. 380, 388.) The opinion of that court upon this point said: "It is doubtless true that the paragraph of the will by which the trust is attempted to be created is susceptible of more than one construction, but a construction which is fairly within the rules of law and that sustains the trust and devotes the fund included therein to purposes permitted by law and to the good of humanity should be preferred." (203 N. Y. 388.)

That the preference clause here, construed as I have above suggested, does not make the trust provision invalid, has been held in effect in several Massachusetts decisions, namely: *Dexter v. Harvard College* (176 Mass. 192, 195), *Kent v. Dunham* (142 id. 216) and *Darcy v. Kelley* (153 id. 433). It seems to me, moreover, that the same doctrine was in effect held by our Court of Appeals in *Matter of Robinson* (*supra*), because that court there upheld the validity of such a trust provision in a will, although that provision contained a preference clause of "persons who are elderly or disabled from work, and to persons who are Christians, of good moral character, members of one of the so-called evangelical churches, to wit, the Methodist, Baptist, Presbyterian, Congregational, Moravian or Episcopal, and who are not addicted to the use of intoxicants or tobacco,

nor to attendance at theatrical entertainments." (203 N. Y. 382, 389.)

The provision requiring the inmates to pay board not exceeding seven dollars a week "Towards paying the running expenses of the house," does not prevent the home being regarded as a charitable institution. (Schloendorff v. New York Hospital, 211 N. Y. 125, 127; Starr v. Selleck, 145 App. Div. 869; *affd.*, without opinion, 205 N. Y. 545.)

I vote, therefore, that the decree of the Surrogate's Court appealed from, which construed the will and held the trust clause invalid, be reversed; and that said preference provision in such clause be construed as herein indicated; and that the decree appealed from, which admitted the paper writing to probate as the last will of the decedent, be affirmed, without costs to either party.

RICH, J., concurred.

Decree of the Surrogate's Court of Westchester county of July 17 (27), 1914, admitting will to probate, and the further decree of said court of March 26, 1915, adjudging invalid the trust attempted to be created under said will, severally affirmed, with a single bill of costs to the executor, and one bill of costs to the contestant, payable out of the estate.

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ACCOUNTING.

ACCOUNTING IN SUBROGATE'S COURT—EXECUTORS AND ADMINISTRATORS—TESTAMENTARY TRUSTEES—WHEN EXECUTORS ENTITLED TO FULL COMMISSIONS
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APPEAL.

- (1.) FROM ORDER ENTERED ON REPORT OF APPRAISER—REQUIREMENTS OF NOTICE OF APPEAL—TRANSFER TAX ACT—DECEDENT ESTATE LAW.

Decedent who died in 1913 leaving no surviving husband, child or parent, gave her residuary estate to charitable corporations. Some of the next of kin opposed the probate of the will while others of them instituted a suit in the Supreme Court to obtain like relief. As the result of a compromise among all the parties, the residuary legatees without renouncing their legacies agreed in consideration of the withdrawal of the objections and the discontinuance of the suit to pay contestants one-third of the amount passing to the residuary legatees under the will, and thereupon it was admitted to probate. The transfer tax appraiser reported that the residuary estate was exempt from taxation under the Transfer Tax Act. *Held*, that an appeal by the state comptroller from the order entered on the report of the appraiser on the ground that his distribution of the estate was in contravention of sections 17-20 of the Decedent Estate Law must fail as section 17 was not applicable and sections 18, 19 and 20 were repealed by chapter 857 of the Laws of 1911.

A notice of appeal which states "that the order entered fixes and assesses an inadequate and insufficient tax on the transfers of the property of said decedent" is a sufficient compliance with the provision of the Transfer Tax Law which requires that a notice of appeal "shall state the grounds upon which the appeal is taken." Matter of Murray..... 255

- (2.) SAME—FROM ORDER OF TRANSFER TAX APPRAISER—EVIDENCE—TRANSFER TAX—CORPORATIONS. See Matter of McMullen..... 336

DECEDENT ESTATE LAW.

- (1.) DECEDENT ESTATE LAW, § 17 — PROVISIONS OF — WHEN DECREASES TAKEN INTO CONSIDERATION — VALUATION APPRAISED BY USE OF LIFE TABLES.

In the application of section 17 of the Decedent Estate Law which provides "No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more," the rule of calculation adopted in *Matter of Johnston* (76 Misc. Rep. 391), to wit: "Ascertain the money value of the estate as it remained at death, subtract therefrom the amount of decedent's debts, pay one-half of the remainder to the corporate legatees, whose legacies were subject to reduction," must be followed. *Matter of Brooklyn Trust Co.* 390

- (2.) SAME.

Where by reason of delay in the disposition of the estate there have been decreases as well as appreciations in the value of its property, and there have been accruals of interest or income, the decreases must be taken into consideration in ascertaining the value of the estate as of the time of the death of the testatrix. *Id.*

- (3.) SAME — VALUATION APPRAISED BY USE OF LIFE TABLES.

Where in the application of section 17 of the Decedent Estate Law it becomes necessary to include in the valuation of the estate the value of vested remainders, they must be appraised by the use of the life tables. *Id.*

- (4.) SAME—FUNERAL EXPENSES—PLEADING—SURROGATES' COURTS—EXECUTORS AND ADMINISTRATORS—CODE CIV. PRO., §§ 2686, 2729 (3).

The petitioner paid the funeral expenses of the decedent to the undertaker and took an assignment for the same from him. The decedent died and the funeral expenses in question were incurred prior to the time subdivision 3 of section 2729 of the Code of Civil Procedure was amended and renumbered as section 2686 of the Code by the amendment of chapter XVIII thereof by chapter 443 of the Laws of 1914 that became effective on September 1, 1914. This proceeding was commenced after said amendment of 1914 took effect. The answer of the administratrix disputed the reasonableness of the amount of the funeral expenses.

Held, that under these circumstances this proceeding is governed by said section 2686 of the Code of Civil Procedure, and not by said sub-

division 3 of said section 2729 of the Code prior to amendment; that, as section 2686 provides that if the answer disputes the reasonableness of the amount of the claim for funeral expenses the surrogate shall direct that the claim so disputed be heard upon the judicial settlement of the account of such administrator, the court has no power now to decide the matter nor take any proof upon it, but must direct that the claim so disputed be heard upon the judicial settlement of the account of the administratrix. Matter of Lucas..... 241

- (5.) SAME—INSURANCE PAYABLE TO WIFE IF LIVING, OTHERWISE TO LEGAL REPRESENTATIVES—WHEN "LEGAL REPRESENTATIVES" CONSTRUED TO MEAN NEXT OF KIN.

Where, upon the judicial settlement of the accounts of an administratrix who was the daughter and only heir and next of kin of the deceased, with whom she lived until his death, it appeared that a policy of insurance taken out by the decedent was payable "to his wife, Jane S. Corwin, if living; otherwise to his legal representatives;" that the word "assigns" was omitted; that the decedent's wife predeceased him; that he died without real property and possessed of but little personalty aside from the proceeds of the insurance, and that he was not a lawyer, the term "legal representatives" as used in the policy of insurance should be held to mean the next of kin and not the administrator. Matter of Viles 511

- (6.) SAME—GIFT OF CERTIFICATE OF DEPOSIT—INDORSEMENT AND DELIVERY FOR COLLECTION ONLY.

Where on the day prior to the death of a woman, a certificate of deposit, payable to her order and indorsed by her, was delivered by a person whom she had named as her executrix, without her own indorsement, to a savings bank which, after indorsing the same, delivered it to another bank for collection, and a few days thereafter the savings bank being advised by its transferrer, the collecting bank, that the certificate had been paid, opened an account in the name of the decedent in trust for the executrix, there was no executed gift of the certificate, since it appears that the certificate was indorsed and delivered solely for the purpose of having it collected. Matter of Marine..... 410

- (7.) SAME—DEVISE TO INDIVIDUALS IN PERPETUITY FOR CHARITABLE USE—DEVISE EXCEEDING ONE-HALF OF TESTATOR'S ESTATE—DECEDENT ESTATE LAW, SECTION 17, CONSTRUED.

A devise to trustees in perpetuity, the income to be applied to the maintenance of churches, ministers and missionaries of a certain religious

denomination located within certain counties, does not offend section 17 of the Decedent Estate Law, although the gift exceeds one-half of the testator's estate. *Decker v. Vreeland*..... 534

(8.) SAME.

Said statute limits the amount of devises and bequests only where the gift is to the charitable institution itself, or, it *seems*, to trustees who are to turn over the corpus to such charitable institution. The statute does not apply to a devise to individuals for charitable uses. *Id.*

(9.) SAME—CLAIM AGAINST—DECLARATION AS TO TRUST FUND—EXECUTORS AND ADMINISTRATORS—WHEN CLAIM ALLOWED.

Where testator's daughter made a claim against his estate for \$18,000, which sum he had declared he held in trust for her and that in the event that she should acquire a house in his lifetime there would become due to her from him said sum, and throughout the remainder of his life he paid her the interest on said sum, his executors are in duty bound to pay over the principal of the trust fund only when testator's daughter shall actually and in good faith prepare for the building or purchase of a house, and her claim to said principal either as a debt due her in testator's lifetime or as one becoming due upon his death must be allowed. *Matter of Mitchell* 373

(10.) SAME—ASSIGNMENT BY NEXT OF KIN—WHEN SUIT TO REFORM ASSIGNMENT DOES NOT LIE—MUTUAL MISTAKE OR FRAUD ESSENTIAL.

Where the brother of a decedent, entitled to share in his estate, absolutely and forever assigned all of his interest in the personal estate of the decedent to the decedent's widow, and released and discharged her as administratrix from all claim or demand which he had or might thereafter be entitled to in said estate, he cannot thereafter maintain a suit in equity to reform said assignment by excluding from the operation thereof certain securities formerly owned by the decedent which have turned out to be of value, if the complaint states no mutual mistake of fact, or a mistake of fact on one side and fraud on the other. *Leary v. Geller* 435

(11.) SAME.

A mere allegation that the widow falsely stated to the assignor that her husband had given the securities to her does not necessarily allege fraud on her part, there being no allegation that the statement was made with an intent to deceive the plaintiff and to induce him to execute the assignment. *Id.*

- (12.) SAME—AGREEMENT BETWEEN DECEDENT AND HER NIECE FOR MUTUAL MAINTENANCE OF HOME CONSTRUED—SUFFICIENCY OF EVIDENCE TO ESTABLISH SUCH AGREEMENT AFTER DEATH OF ONE OF PARTIES—INTERESTED WITNESS. See Matter of McMillan..... 106
- (13.) SAME—ACTION TO RECOVER MONEYS ALLEGED TO HAVE BEEN LOANED BY TESTATOR TO DEFENDANT—EVIDENCE—RES ADJUDICATA. See Newcomb v. La Roe 89
- (14.) CONSTRUCTION OF STATUTES—DECREE OF PROBATE—DECEDENT ESTATE LAW, § 91.
The statute (Decedent Estate Law, § 91), providing that when an inheritance shall have come to the intestate from a deceased husband or wife the inheritance shall descend to the heirs of such deceased husband or wife if the intestate leave no heirs entitled to take, does not create a new class of heirs at law, but in operation is tantamount to a gift from the state of its escheats or rights of what is known as caducary succession. Matter of Leslie..... 360
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- (16.) SAME.
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- (17.) SAME.
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- (18.) SAME—REAL PROPERTY—DESCENT—DESCENT OF BROTHER OF THE HALF BLOOD WHO IS ALSO COUSIN BY MARRIAGE OF ANCESTOR WITH DECEASED WIFE'S SISTER.
The half brother of an intestate, who is also her cousin by reason of the fact that the intestate's father married his deceased wife's sister, and also the descendants of the deceased half brother, being nieces of the half blood, are "of the blood" of the intestate and inherit her real estate to the exclusion of other cousins who are descendants of a deceased aunt of the intestate. Cornell v. Child..... 538

(19.) SAME—ANCESTOR DEFINED.

Where a sister inherits lands from her brothers "they are ancestors" from whom the estate is derived within the meaning of section 90 of the Decedent Estate Law, and the lands so inherited by the sister descend to her brother of the half blood and to the descendants of a deceased brother of the half blood under the circumstances aforesaid. *Id.*

(20.) HUSBAND AND WIFE—DECEDENT'S ESTATE—TITLE OF HUSBAND TO PERSONAL PROPERTY OF DECEASED WIFE—RIGHT OF HUSBAND TO MONEYS ON DEPOSIT IN NAME OF WIFE—ADMINISTRATION NECESSARY.

Upon the death of a wife, intestate and without descendants, the title of her personal property of all kinds at once passes to and vests in her surviving husband, notwithstanding the statutory provisions which have secured to the wife during coverture the same rights to her separate property and the disposition thereof that she would have enjoyed if unmarried. This title is derived solely from the *jus mariti*. *Gerber v. The State Bank*..... 64

(21.) SAME.

Where a wife dies intestate without descendants, and without leaving any debts, the husband, although of sufficient financial responsibility to pay her debts, if she should have any, cannot recover in his individual capacity, without administration, moneys on deposit in the name of the wife at the time of her death. *Id.*

EQUITY.

(1.) WILL—JURISDICTION OF COURT OF EQUITY TO CONSTRU E DEVISES—PLEADING—COMPLAINT.

A court of equity has no inherent power to construe devises as a distinct and independent branch of its jurisdiction, but exercises such power only as an incident to its jurisdiction over trusts.

Hence, where a testator gave all his personal property to his wife and also gave to her his residuary estate during her life or until she remarried, with a power of appointment, and provided that if she did not exercise the power then such property should pass to his children and their survivors, and the widow died unmarried without exercising the power of appointment, the children take only a *legal estate*, and, therefore, a court of equity has no jurisdiction of a suit to which they are parties for the construction of the will. *Von Meyer v. Lindemann*.. 68

(2.) SAME.

A complaint which, after setting out a copy of the will of the testator, alleges among other things that the widow died without having remarried, leaving a will which was duly admitted to probate, but contains no allegation from which it can be inferred that she exercised the power of appointment, does not state facts sufficient to constitute a cause of action for the construction of the will of the testator. *Id.*

- (3.) SAME—EXECUTORS AND ADMINISTRATORS—SUIT FOR ACCOUNTING—DEFENSE—LACHES—WHEN LACHES AVAILABLE AS A DEFENSE, ALTHOUGH NOT SPECIFICALLY PLEADED—STATUTE OF LIMITATIONS—TRUST. See *Kellogg v. Kellogg* 470

EXECUTORS AND ADMINISTRATORS.

- (1.) PROVISIONS OF WILL—APPLICATION FOR CONSTRUCTION OF WILL—RIGHT OF EXECUTOR TO PAY FUNERAL EXPENSES.

A will contained the provision: "I direct my executor after paying the above bequests out of the balance of my money on deposit in the Bowery Savings Bank and Seamans Savings Bank, that said balance shall be used to defray Funeral Expenses and the erection of a monument over my grave."

Decedent's estate amounted to \$1,471.95 and the net amount to become available for the erection of a monument would probably amount to \$253.18. The executor, being in doubt as to whether he was required to expend the whole amount of the balance referred to for the erection of a monument, applied for a construction of the will.

Held, that without any testamentary direction to that effect an executor has the right to pay the funeral expenses of the decedent, and a reasonable sum for a tombstone is regarded as a legitimate item of such expenses; that no arbitrary rule can be laid down establishing what is such reasonable sum, and each case depends for its determination upon its own peculiar conditions; that the provision under consideration did not in terms require that all of the balance should be expended for funeral expenses and the erection of a monument, and that the intent of the testatrix was that so much of the balance as would be reasonable, having in mind her station in life and the amount of her estate, should be used for such purposes. *Matter of Young* 332

- (2.) SAME—WHAT IS A CHARGE ON REAL PROPERTY—WILLS—CONDITIONAL LEGACY.

Where prior to the death of testator's widow his personal estate had been fully administered and applied in accordance with the terms and

provisions of his will, a legacy of \$500 given "to the trustees of the Reformed Church at Tappan" on condition that they keep testator's family burial plot in good order, etc., is a charge upon the real property which comprises testator's residuary estate. *Matter of Knapp*..... 199

- (3.) SAME—RIGHT TO LETTERS—WHEN INSTRUMENT PURPORTING TO BE A LAST WILL AND TESTAMENT DENIED PROBATE—WHEN RIGHT OF WIDOW TO LETTERS ABSOLUTE.

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- (4.) SAME.

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- (5.) SAME—WHO ENTITLED TO ANCILLARY LETTERS IN THIS STATE—WHO MAY APPLY FOR REVOCATION OF—WILLS.

The only persons entitled to ancillary letters in this state are the persons entitled to the possession, in the domiciliary state, of the personal estate of the decedent. *Matter of Connell*..... 303

- (6.) SAME.

Local next of kin are not entitled to notice of an application for ancillary letters, but for protection they should resort to the courts of the last domicile of decedent where the last will of their testatrix is acted on by public authority. *Id.*

- (7.) SAME.

As the local next of kin are not entitled to ancillary letters and not entitled to notice of an application therefor, they cannot apply for the revocation of such letters on the ground that the papers on which such letters were granted are defective. *Id.*

- (8.) SAME—APPLICATION BY COUNTY TREASURER FOR REVOCATION OF LETTERS OF ADMINISTRATION—CODE CIV. PRO., § 2570.

Where letters of administration upon the estate of a resident alien and subject of the kingdom of Italy were issued to the proper consular agent, and the estate, which is small, is ready for final distribution, the

surrogate under section 2570 of the Code of Civil Procedure may in his discretion refuse to entertain an application made by the county treasurer for the revocation of the letters of administration, and by reason of the treaty between this country and Italy it will be decreed that the fund be paid to the consul general of Italy residing at the city of New York who appeared in behalf of the next of kin of decedent. Matter of Baldasarro 327

(9.) SAME—APPLICATION TO, FOR ADVANCEMENT TO LEGATEE—WHEN APPLICATION WILL BE DENIED.

An application for an advance payment on a legacy denied because (1) the moving papers do not show that the husband has not sufficient means to support and maintain the legatee; (2) it does not conclusively appear that the income which petitioner is receiving from the estate is insufficient for her support, and (3) there is no fund indefeasibly vested in her from which the advancement asked for can be made. Matter of Kohler 217

(10.) SAME—TO WHOM LETTERS GRANTED—WHEN LETTERS REVOKED.

Where on petition of a sister of a decedent for the revocation of letters of administration granted to one claiming to be his widow she admits that she was never married to decedent, such admission being against her interest, it must be taken as a fact that they were never married, and the letters will therefore be revoked and administration granted to petitioner. Matter of Morris..... 330

(11.) SAME—COMMISSIONS ALLOWED TEMPORARY ADMINISTRATORS—SURROGATE'S COURT.

The amount of commissions to be allowed to temporary administrators cannot be determined in advance of the judicial settlement of their accounts, and any provision in the order appointing them limiting or determining the amount of such commissions must be stricken out. Matter of Eno..... 356

(12.) SAME.

An order appointing one as a temporary administrator should not provide that he serve without compensation, and where his appointment was conditioned upon his consenting to serve without compensation such consent should be filed in the Surrogate's Court before the order appointing such administrator is signed. Id.

(13.) SAME—WHEN BALANCE PAID TO ADMINISTRATOR—EVIDENCE.

Where claimant received from decedent, a feeble and illiterate old man, certain money upon the understanding that out of it should be paid his

living expenses and the cost of his burial, the balance must be paid over to the administrator in the absence of clear and adequate proof that claimant is entitled to retain it. Matter of May..... 347

- (14.) SAME—PETITION FOR JUDICIAL SETTLEMENT OF ACCOUNTS—WHEN BANK NOT NECESSARY PARTY TO PROCEEDING—WHEN MOTION TO DISMISS GRANTED; PARTIES—TO PROCEEDINGS FOR JUDICIAL SETTLEMENT OF ACCOUNTS OF EXECUTOR—CODE CIV. PRO., §§ 2510, 2736. See Matter of Kenny 308

- (15.) SAME—COMPLAINT TO SET ASIDE CONVEYANCE BY EXECUTORS—ILLEGALITY OF SALE ADMITTED BY DEMURRES—WILL CONSTRUED—DISCRETIONARY POWER OF SALE.

Where the complaint in an action brought by an heir at law and devisee to set aside a conveyance of lands made by executors alleges that the conveyances were made "for no purpose provided for by the will, and in contravention thereof; * * * of all of which facts * * * each of the defendants * * * had notice," a demurrer admits the truth of such allegation, and hence will be overruled, although the will itself by another provision vests the executors with a discretionary power of sale. Wellbrock v. Roddy..... 439

- (16.) SAME.

It seems, that a will which states that "for the purpose of carrying out the provisions of this, my will, without being in contravention of same, I authorize and empower my qualifying executors * * * to sell and convey at any time all and any piece of my property, when in their judgment they shall deem it necessary and advisable," confers upon the executors a power of sale in their own discretion. The words relating to a sale "in contravention" of the will are superfluous and in no way limit the discretion of the executors. *Id.*

GIFT.

- (1.) OF CERTAIN SHARES OF CORPORATE STOCK—NO EVIDENCE OF DELIVERY—EXECUTORS AND ADMINISTRATORS.

Where a claim against an estate is based on a personal transaction between decedent and claimant, clear and convincing proof is needed.

Where a father declares he has given certain shares of corporate stock to his son, who is also his executor, and thereafter throughout his life keeps such property in his own hands taking to his own use all the income thereof, and after his decease the certificate of stock upon which was

indorsed the usual assignment and power of attorney signed in blank by decedent is surrendered and a new certificate for a like number of shares issued to the executor in his own name personally, and there is no evidence as to whether the original certificate at the time of its surrender was held by the executor as his own property or as executor, the presumption is that decedent remained the owner of the stock at his death and the son has not affirmatively established that there was a delivery to him of the stock with intent to effect a gift. *Matter of Gilman*. 202

- (2.) SAME—FUNDS IN BANK—WHAT IS A VALID GIFT INTER VIVOS—EVIDENCE. See *Matter of Klein*..... 297

GUARDIANS.

- (1.) APPLICATION FOR ANCILLARY LETTERS OF GUARDIANSHIP—CODE CIV. PRO., § 2654(2).

Under section 2654(2) of the Code of Civil Procedure an application for ancillary letters of guardianship must be made by the person authorized to act as guardian within the county where the infant resides, but no provision of said Code authorizes the surrogate to issue joint letters of guardianship. *Matter of Breese*..... 348

- (2.) SAME—OF INFANTS—WHO MAY MAKE APPLICATION FOR APPOINTMENT—COURT GUIDED BY BEST INTERESTS OF INFANT—EVIDENCE. See *Matter of Cross* 244

- (3.) SAME—GUARDIANSHIP OF INFANT OF TENDER YEARS.

Appeal from a decree of the Surrogate's Court appointing a general guardian of the person of an infant five years of age. The mother being dead, the father while on his death bed gave the custody of the infant to his sister, with whom the infant still resides. The proceedings were instituted by the maternal grandfather of the infant, a man of advanced years. On all the evidence, *held*, that, although both claimants to the right of guardianship were well fitted for that duty, it was proper for the court to appoint the husband of the father's sister. *Matter of Burt* 96

JURISDICTION.

- (1.) OF SUPREME COURT—REGULARITY OF ASSIGNMENTS—WHEN EXAMINATION OF RESPONDENTS UNNECESSARY—WHEN PROCEEDING IN SURROGATE'S COURT DISMISSED.

Where upon the return of an order granted for the examination of respondents upon the petition of an administrator alleging that respond-

ents have the custody, possession or control of a certain real estate mortgage which had been assigned by petitioner's intestate to one of the respondents and by him to the other respondents, both assignments being regular in form, the answers allege possession, custody and title in one of the respondents and set forth the transaction, means and sources of title with a full statement of the records thereof and place of recording, an examination of respondents is unnecessary. *Matter of Higgins*. 195

(2.) SAME.

The trial of the issues raised by the petition and answers is exclusively within the jurisdiction of the Supreme Court and the proceeding in the Surrogate's Court will be dismissed. *Id.*

(3.) SAME—TO DETERMINE OWNERSHIP OF PERSONAL PROPERTY ALLEGED TO BELONG TO ESTATE BUT CLAIMED BY AN EXECUTOR—NOT AFFECTED BY FACT THAT ONLY ONE OF TWO EXECUTORS MAKES CLAIM. See *Matter of Watson* 9

(4.) SAME—OF SURROGATE—CONSTITUTIONAL LAW—CODE CIV. PRO., § 2510; EXECUTORS AND ADMINISTRATORS—ACCOUNTING—JUDICIAL SETTLEMENT OF ACCOUNT OF GENERAL GUARDIAN—ADMINISTRATOR WITH WILL ANNEXED—TRUSTS—WILLS. See *Matter of Brewster* 316

(5.) SAME—CONTESTED PROBATE PROCEEDINGS IN NEW YORK COUNTY—WAIVER OF RIGHT TO JURY TRIAL—VALIDITY OF ORDER GRANTED BY ONE SURROGATE IN VIOLATION OF STIPULATION MADE BEFORE THE OTHER SURROGATE—MOTIONS AFFECTING CONTESTED PROBATE PROCEEDINGS, WHERE MADE. See *Matter of Holme* 55

LEGACIES.

SPECIFIC AND GENERAL—PAYMENT OF DEBTS AND EXPENSES.

Certain legacies held to be specific and another general and the assets of the estate to be applicable to the payment of debts and expenses as follows: First, the unbequeathed personalty as to which testator died intestate, and, second, a general legacy and then the specific legacies. *Matter of Klatte* 349

NOTES.

NOTE ON CONDITIONAL LEGACIES 212

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PRACTICE.

SURROGATE'S COURT—CONTESTED PROBATE PROCEEDINGS—WHEN CONTESTANT NOT ENTITLED TO SET ASIDE PROCEEDINGS AS UPON A DEFAULT.

Where, after the adjournment of a contested probate proceeding before a surrogate of New York county at Trial Term, an order was granted by the other surrogate at Chambers, in violation of an oral stipulation made before the first surrogate, and in contravention of the provisions of the Code of Civil Procedure, allowing the contestant to file a new answer demanding a jury trial to be held after the adjourned date, the parties appear before the surrogate at Trial Term on the adjourned date and the contestant refuses to proceed, and deliberately abandons the case, and the will is duly admitted to probate, the contestant is not entitled to set aside the proceedings as upon a default. *Matter of Holme* 62

TAXES.

(1.) TRANSFER TAX—WHEN GOOD-WILL CONSTITUTES AN ASSET OF DECEDENT'S ESTATE —WILLS—EVIDENCE—REPORT OF APPRAISER.

While the facts that decedent, who for nearly twenty years immediately preceding his death had conducted a manufacturing business, did not advertise in trade publications or daily newspapers but depended solely upon traveling salesmen for the sale of his manufactured product may be considered in estimating the good-will of the business they do not necessarily prove that there was no good-will; if, after deducting a reasonable sum for the services of decedent and for interest on capital invested, the business showed profits it had a good-will that constituted an asset of decedent's estate. *Matter of Gumbinner* 259

(2.) SAME.

The average net profits of the business for the five years next preceding the date of decedent's death, to be ascertained as indicated by the court, multiplied by two, held to represent the value of the good-will of the business. *Id.*

(3.) SAME.

The evidence showing that certain machinery in a factory located in another state and run by decedent in connection with his business did not constitute a part of the building and was not erected in such a manner that its removal would materially alter or deface the building, the appraiser was correct in including in the assets of the estate the said machinery. *Id.*

(4.) SAME.

Decedent having directed that the income from his residuary estate be paid to his widow and daughter during their respective lives and upon the death of the survivor that the principal be divided among the surviving issue of the daughter *per stirpes* and in the event of her death without leaving issue such remainder to be divided into sixty equal parts and paid to the various legatees mentioned in the will, the remainder should be divided into sixty parts and each legacy presently taxed as if it were bequeathed to an individual of the five per cent. class. Id.

(5.) SAME—ARRIVING AT VALUE OF UNLISTED STOCK FOR TRANSFER TAX PURPOSES—EVIDENCE.

In arriving at the value of an unlisted stock for transfer tax purposes, direct evidence of sales at or about the time of death will outweigh an unverified report of an investors' agency based upon offers claimed to have been made by various unnamed brokers, and upon quotations in a financial publication, nothing being shown as to the weight to be given such publication. Matter of Newman..... 143

(6.) SAME—WHEN AFFIDAVIT OF ADMINISTRATOR MISSTATED MARKET VALUE OF CERTAIN STOCK—ASSESSMENT OF TAX—WHEN ERROR MAY BE CORRECTED.

Where it is conceded that the affidavit of the administrator in a transfer tax proceeding inadvertently misstated the market value of certain stock belonging to the estate, and that following the report of the appraiser based on such statement the tax was assessed as if the stock was of its fair market value instead of its true value, the error may be corrected even after the lapse of two years from the making of the order assessing the tax. Matter of Boyle..... 295

(7.) SAME—APPEAL FROM ORDER FIXING TRANSFER TAX—RIGHT OF SURVIVORSHIP.

On appeal by an executor from an order fixing the transfer tax on the estate it appeared that the decedent and his surviving wife by their joint industry and effort during decedent's lifetime had accumulated the real and personal property of which the decedent died seized and that the bond, mortgage and certificate of deposit which were assessed reflected such property so accumulated and had been taken in the name of the husband and wife;

Held, that the decedent intended when such investments were taken in his, and his wife's name, to create in his wife a right of survivorship, and that therefore the amount represented by the bond, mortgage and certificate of deposit was not subject to the payment of a transfer tax. Matter of Keil 238

TRUSTS.

(1.) AGREEMENT TO PAY SALARY—ASSOCIATIONS—WHEN TRUST INVALID FOR INDEFINITENESS.

Testatrix left all her property to her brother, defendant's intestate, "after carrying out any requests I may make to him in my lifetime as to the disposition of my estate for charitable objects." The brother by letter agreed with plaintiff, a nursing association, to pay the salary of a third nurse so long as the association should support the other two, stating that said salary would be paid out of the funds left by his sister for that purpose, and such payment was made until shortly before his death.

Held, that as there was no specific fund to which a trust could attach and no definite proof that defendant's intestate became possessed of any property left by testatrix and the claimed trust was invalid for indefiniteness, a finding of a trust *ex maleficio* was not warranted. District Nursing Assn. of Buffalo v. Koemer..... 161

(2.) SAME—IRREVOCABLE—DEPOSIT OF MONEY IN SAVINGS BANK IN TRUST—WHEN NOT SUBJECT TO TRANSFER TAX.

Where a decedent deposited certain of her own money in a savings bank in her own name in trust for a named niece, and at a time not shown delivered to her the bank book which remained in her possession continuously until decedent's death, and it appears that there were neither withdrawals nor additions to the deposit, the finding must be that the deposit was of the character of an irrevocable trust and therefore not subject to a transfer tax. Matter of Rudolph..... 323

(3.) SAME—CHARITABLE GIFT FOR BENEFIT OF PUBLIC—VALIDITY UNDER SECTION 12 OF PERSONAL PROPERTY LAW.

A gift by a decedent of one-half of her residuary estate to her executors, "in trust, nevertheless, to be used and devoted by them to the establishment of a school for girls in the town of North Salem," is valid as a charitable gift for the benefit of the public under section 12 of the Personal Property Law, where it appears that the decedent, a woman of charitable impulses, and leaving no children or descendants, had long been a resident of said town, which was inhabited by people of small means and in which the facilities for public education were meagre. Butterworth v. Keeler 420

(4.) SAME—CREATION BY WILL—LIFE BENEFICIARY.

Where a trust created by will is that the life beneficiary shall have the net income, all that the will assures to him is the income which must bear all the just and proper expenses of carrying the assets of the trust fund unless exonerated by the will. Matter of Brooklyn Trust Co.. 370

- (5.) **SAME—TRANSFER TO TRUSTEES OF ALL REAL AND PERSONAL PROPERTY—PROVISIONS—WILLS—FIXING TAX UNDER LAW AS IT EXISTED AT DEATH OF SETTLOR.** See *Matter of Valentine*. 146
- (6.) **TESTAMENTARY TRUSTEES—ACCOUNTING BY—JURISDICTION OF SURROGATE—CONSTITUTIONAL LAW.**
- A surrogate upon the judicial settlement of the accounts of a testamentary trustee has not the general equitable jurisdiction and power of a chancellor; he cannot refer a part of the objections interposed to the account but must refer all or none.
- Whether the late legislation attempting to confer general equity jurisdiction on the surrogate is constitutional, *quare*. *Matter of Kent*. 267
- (7.) **SAME—PRACTICE.**
- The practice on motion to file affidavits affecting the subject-matter of the accounts indicated.
- The intermediate application of a legatee for payment of her share granted.
- (8.) **TESTAMENTARY TRUSTEES—EFFECT OF RENUNCIATION OF TRUST BY ONE OF TWO OR MORE TRUSTEES—WHEN RENOUNCING TRUSTEE MAY NOT RETRACT HIS REFUSAL TO ACT—TRUSTEES MAY RECEIVE AND INVEST TRUST ESTATE OF PERSONALTY BEFORE FINAL ACCOUNTING OF EXECUTOR.** See *Matter of Kellogg* 1

WILLS

- (1.) **ACTION TO ESTABLISH WILL UNDER SECTION 1861, CODE OF CIVIL PROCEDURE—HUSBAND AND WIFE—ANTE-NUPTIAL AGREEMENT TO LEAVE PROPERTY TO WIFE BY WILL.**
- Where a woman marries on the faith of her husband's oral ante-nuptial agreement to make a will in her favor, which promise he subsequently fulfilled, but afterwards made other testamentary disposition of his property, the Surrogate's Court has no jurisdiction to determine the validity of the ante-nuptial agreement or to enforce its provisions. *Adams v. Swift* 493
- (2.) **SAME.**
- But the Supreme Court under its inherent equitable powers has jurisdiction to enforce such ante-nuptial agreement in an action brought under section 1861 of the Code of Civil Procedure to procure a judgment establishing the will made pursuant to said agreement, the same being

inaccessible owing to the fact that it has been probated in a foreign State, and in such suit the court may enjoin the probate of the subsequent will. *Id.*

(3.) **SAME.**

A person may bind himself by contract to make a particular disposition of his property by will, and such contract, if validly made upon a sufficient consideration, will be enforced in equity.

Although such parol ante-nuptial agreement is unenforceable while executory, the Statute of Frauds does not apply where, after the marriage, the promisor actually executed the contract by making a will pursuant to its terms. *Id.*

(4.) **SAME—LETTERS TESTAMENTARY—WHEN GRANTED—WHEN QUESTION OF RELATIONSHIP TRIED BY JURY—EVIDENCE.**

On a petition praying that a decree admitting a will to probate and the letters testamentary issued accordingly be revoked upon the ground that the same were obtained by a false statement of a material fact in that the proponent failed to state that the petitioner was the widow of the decedent and falsely stated that the testator left him surviving no widow, the petitioner claimed as a matter of right to have the question of relationship to the decedent tried by a jury.

Held, that the question whether the petitioner was the widow of the decedent is a preliminary question that may and should be determined before the merits of the proceeding itself are inquired into; that the fact that in some actions triable by jury the issue of marriage is involved does not fix the right to have this issue tried by a jury regardless of the action in which it arises; and that the issue presented in this case is not one of which the petitioner has a constitutional right of trial by jury. *Matter of Reinhardt*..... 251

(5.) **SAME—PROBATE—EVIDENCE OF DOMICILE OF TESTATOR—RECORD OF PROBATE IN FOREIGN STATE OF SUBSEQUENT WILL.**

In a proceeding for the probate of a will a record of the proceedings of the Probate Court of Ohio, including an order admitting to probate a later will of the testator, authenticated in compliance with section 906 of the United States Revised Statutes, offered in evidence for the purpose of establishing the later will and the revocation of the will in question, is not a bar to an inquiry as to the domicile of the testator; it is not even competent evidence of the fact of domicile, where neither the proponent nor the heirs at law nor next of kin were parties to the proceeding. Hence, the surrogate has power to decide that the testator was a resident within his jurisdiction. *Matter of Horton*..... 445

(6.) SAME—PROBATE—EVIDENCE AS TO CONTENTS OF PARAGRAPHS CUT FROM WILL BY TESTATRIX—HEARSAY—RES GESTAE—WHEN SUBSEQUENT MOTION TO STRIKE OUT INCOMPETENT EVIDENCE SHOULD BE GRANTED—ATTEMPTED CANCELLATION OF PARTICULAR CLAUSES OF WILL—EFFECT OF FAILURE TO ESTABLISH CONTENTS OF PORTION OF CLAUSES CUT FROM WILL. *Matter of Kent* 461

(7.) SAME—ACTION TO REVOKE PROBATE UNDER SECTION 2653A OF CODE OF CIVIL PROCEDURE—ACTION PENDING WHEN SECTION REPEALED, ALTHOUGH SOME PARTIES NOT SERVED—EVIDENCE—EXECUTION OF WILL—EXAMINATION OF SUBSCRIBING WITNESS. See *Raught v. Weed*..... 523

(8.) SAME—EVIDENCE INSUFFICIENT TO ESTABLISH UNDUE INFLUENCE.

Plaintiff brought an action to contest the validity of her sister's will upon the ground that it had not been properly executed, and that the testatrix was of unsound mind and physically weak, but the only issue submitted to the jury was the question whether or not the execution of the will had been procured by the undue influence of a brother of the testatrix. A verdict in favor of the defendants was set aside for the erroneous admission of statements by the testatrix subsequent to the execution of the will as to why she did not make the plaintiff "an heir" and as to the criticisms upon the conduct of her nephews subsequent to the execution of a prior will. *Held*, on all the evidence, that the plaintiff did not sustain the burden of proof which was upon her, even though the evidence claimed to have been erroneously admitted, be disregarded, and that the verdict should be reinstated. *Hutchinson v. McCaddon* 431

(9.) SAME—DUE EXECUTION OF—TESTIMONY ON PROBATE CONSIDERED—WHEN PROBATE MAY NOT BE DENIED.

Testimony on a proceeding to probate a will considered, and *held* that testator at the time of the execution of the instrument had full testamentary capacity, and that there was no proof that undue influence was practiced upon him at such time. *Matter of Talbot*..... 191

(10.) SAME.

A will duly executed by a competent testator free from restraint at the time of its execution may not be denied probate on the ground that testator did not sign his name at the end of the instrument where it appears that there was no date inserted at the beginning of the will nor in the body of it, nor above the signature of testator, the only date appearing just below the attestation clause. *Id.*

- (11.) SAME—EXECUTION OF—DRAWN BY INEXPERIENCED LAYMAN—CONSTRUCTION OF WILL—BEQUESTS—POWER OF SALE UNDER—CODE CIV. PRO., § 2615. Matter of Schriever..... 227

- (12.) SAME—EXECUTION—WILL CAUSING INTESTACY AS TO PERSONAL PROPERTY—FAILURE TO READ INSTRUMENT TO TESTATRIX—WILL BENEFICIAL TO ATTORNEY WHO DREW IT—PRESUMPTION OF FRAUD.

Appeal from a judgment determining that a will admitted to probate was not the will of the testatrix because of the execution by her of a later will. In her first will the testatrix gave to her husband the life use of her realty and household furniture, the remainder to go to her brothers and sisters or their descendants. It was shown that the testatrix had expressed a desire to change her will because of some dissatisfaction on the part of a relative and that, she being in a critical condition and under the influence of opiates, her husband, a lawyer, drew a second will which she signed without having had the same read over to her. The second instrument disposed of the realty only, leaving her intestate as to her personal property, including \$5,000 in the bank, which will go to her husband under the statutes of distribution. On all the evidence, *held*, that the husband failed to rebut the presumption of fraud arising from the fact that, being an attorney at law, the will was favorable to him, and that the second instrument was not the will of the testatrix and not entitled to probate. *Evans v. Trimble*..... 449

- (13.) SAME—EXECUTION—SIGNATURE OF TESTATRIX—DEVISE TO TRUSTEES IN PERPETUITY—LIMITATION OF INCOME TO USE OF PERSONS SPECIFIED—WHEN OBJECT OF PERPETUAL TRUST NOT CHARITABLE—UNLAWFUL SUSPENSION OF POWER OF ALIENATION. See Matter of MacDowell..... 543

- (14.) SAME—CONSTRUCTION.

A testator devised and bequeathed all of his estate to his wife to be used by her for the support and maintenance of herself and children so long as she remained his widow, but in case of her remarriage, the use and control of the estate was to pass to his son Thomas who was to support and provide for the children till the youngest became of age, subject to the right of dower. It was also provided that after the death of the wife or her remarriage, if such events should occur before the youngest child became of age, all the real estate and the remaining personal property should go to Thomas absolutely, subject to the support and maintenance of the children till they reached the age of twenty-one years. The testator died, survived by a widow and nine children, and leaving both real and personal property. The widow died without remarrying, after the youngest child had become of age.

Provisions of the will examined, and *held*, that the testator did not intend to give his property absolutely to his son Thomas, unless the wife should die or remarry before the youngest child became of age;

That the remaining property should be distributed share and share alike among the surviving children. *Nolan v. Nolan*..... 455

(15.) SAME—GIFT OF CONTINGENT REMAINDER TO HEIRS OF LEGATEE IF SHE DIES BEFORE TESTATRIX.

Where a gift of a residuary estate is made to specified persons, "their heirs and assigns, to have and to hold the same for their own use, benefit and behoof forever, share and share alike, *per stirpes* and not *per capita*," the provision should be read as if the words "*per stirpes* and not *per capita*" followed "assigns" before the *habendum* clause, for they relate to the persons who are to take and not to the quality of the estate to be taken. *Matter of Tamargo*..... 502

(16.) SAME.

Although one of the residuary legatees was dead at the time the will aforesaid was executed, and the legacy to her lapsed because she was not a descendant of the testatrix, there was no intestacy as to that gift, for the testatrix by the words aforesaid intended that if the beneficiary named should predecease her, the gift should go to the heirs of said beneficiary "*per stirpes* and not *per capita*." *Id.*

(17.) SAME.

If possible, that construction will be given to a will which avoids intestacy. *Id.*

(18.) SAME—PROVISIONS OF—LEGACIES—WHEN ESTATE IN REMAINDER VESTED.

A will after general legacies made provision for each of the four children of testator in separate paragraphs of which one was as follows:

"*Statth.* I give, devise and bequeath unto my daughter Mary Augusta for her sole and separate use, free from the control of any present or future husband, the net income of one other one-quarter of my estate for and during the full end and term of her natural life, and upon her death I give, devise and bequeath the said one-quarter of my estate to the lawful issue of the said Mary Augusta, and in default of such lawful issue I give, devise and bequeath the same to the survivors and survivor of my children and the lawful issue of such of my children as shall be dead."

Held, that upon the death of Mary Augusta, who died after the testator, the estate in remainder vested in equal shares in the repre-

representative of her son who died in her lifetime, his child, his brother and the children of said brother. Matter of Van Cleef..... 384

(19.) SAME.

Where a testatrix gave to her daughter the net income of her estate for life, remainder to the "heirs" of said daughter upon her death, and the only heir of the life tenant at the time of her decease was her half sister, a daughter of her father by his first wife, the half sister is entitled to the remainder, to the exclusion of the brothers and sisters of the testatrix and their descendants.

Such construction to the word "heirs" will be given as will prevent a partial intestacy. Stack v. Lebeman..... 414

(20.) SAME—DECEDENT ESTATE LAW—SECTION 90 CONSTRUED.

Section 90 of the Decedent Estate Law, which provides that relatives of the half blood shall not inherit from an intestate, if they are not of the blood of the ancestor from whom the property descends, has no application to the will aforesaid, for the remainderman takes under the will itself and not directly by descent or distribution from the life tenant. Id.

(21.) SAME—CONSTRUED—BEQUEST OF NET INCOME OF RESIDUARY ESTATE FOR LIFE—COST OF CARRYING UNPRODUCTIVE REALTY—WHEN EXPENSE CHARGEABLE AGAINST INCOME.

Where a testator placed his residuary estate consisting of real and personal property in trust, the net income therefrom to be paid to his widow for life, the cost to the trustees of carrying unproductive real property which is part of the residuary estate should be paid out of the income of said estate rather than out of the principal, and the life tenant is not entitled to receive the income free of such deduction, there being nothing in the will itself showing an intention to impose said carrying charges upon the principal of the estate. Spencer v. Spencer. 403

(22.) SAME—CONSTRUCTION OF—LIFE TENANTS—TRUSTEE IN BANKRUPTCY—EXECUTORS AND ADMINISTRATORS.

The construction of a will as determined by the Court of Appeals must be followed in the decree made upon the judicial settlement of the accounts of the administrator with the will annexed.

While a life tenant is still living, the trustee in bankruptcy of one entitled only to an interest in the estate in remainder is not entitled to a construction of the will, or to an adjudication in reference to the remainder, and the decree to be entered upon the judicial settlement of the accounts of the administrator with the will annexed should contain no adjudication in relation to the interest of the bankrupt. Matter of Gill 358

- (23.) SAME—CONDITIONAL REQUESTS AS TO PAYMENT OF DEBTS—PETITION MADE UNDER SECTION 2615 OF CODE OF CIVIL PROCEDURE—WHEN PETITION DENIED.

Where a petition made under section 2615 of the Code of Civil Procedure for the construction of a will by the son of testatrix to whom bequests were made on condition that he pay the debts of testatrix within a year after her decease alleges that it will be practically impossible for him to comply with the condition and asks that the limitation of one year be eliminated the application will be denied as any construction of the will based on the assumption that petitioner will not comply with said condition would not only be premature but speculative and impractical. Matter of Leary 220

- (24.) SAME—OF MOVABLES—GOVERNED BY LAW OF TESTATOR'S LAST DOMICILE—RIGHTS OF LEGATEE.

A will of movables is generally, in the absence of other intentions, to be governed by the law of the testator's last domicile.

Where under a French will of a domiciled Frenchman there is a universal succession to movables, the rights of a legatee thereto depend on the law of France, although the will may have been probated in the state of New York in the first instance. Matter of Coudert..... 264

- (25.) SAME—CLAUSE IN, AS TO GOOD-WILL OF BUSINESS—TRANSFER TAX.

Where as the result of an oral agreement between testator and his brother, who was his partner in business, that in the event of either dying nothing should be paid by the survivor for the good-will or firm name, and that the last will of each partner should contain such a provision, a clause in testator's will that his death should not dissolve the partnership and that the extent of his interest in the firm should be determined within a certain time and nothing paid by his estate for the good-will or firm name does not justify a finding in a proceeding to fix a transfer tax that the good-will of the firm had no existence; the testator could not by his will reduce to nothing a substantial asset of his estate and thus escape its proper taxation. Matter of Burgheimer..... 223

- (26.) SAME—DEVISE WITH CONTINGENT REMAINDERS OVER IF BENEFICIARY DIES WITHOUT ISSUE—ACCOUNTING BY EXECUTRIX—WHEN CONTINGENT REMAINDERMEN MAY INSTITUTE PROCEEDING.

A will wherein the testatrix by a first clause gave and bequeathed to her daughter all her property of every kind and description and by a second clause gave and bequeathed to the nephews and nieces of the testatrix all the estate received by the daughter by virtue of the will and held by her at the time of her decease, if she should die without issue,

does not give to the daughter a fee simple absolute in the real property, but reserves to the nephews and nieces, as remaindermen, certain contingent interests which make them persons "interested in the estate" of the testatrix within the meaning of the statute. Hence, a nephew of the testatrix is entitled to maintain a proceeding to compel the daughter as executrix to make an accounting. *Matter of Barse*..... 72

(27.) SAME—WHEN REQUEST NOT SPECIFIC—CODE CIV. PRO., § 2615.

The first paragraph of a will bequeathed "fifteen shares of American Car and Foundry Preferred Stock, and twelve shares of United States Steel Common," and the second paragraph, "any money remaining to my credit in the Bank of Savings, in the City of New York, and my gold watch and chain and bracelet with fifteen gold dollars attached," to legatees named. *Matter of Werle*..... 206

(28.) SAME.

It appeared that the testatrix left only \$225, in addition to the property bequeathed in said paragraphs of her will, which sum was not sufficient to pay debts, funeral and testamentary expenses. *Id.*

(29.) SAME.

In a proceeding for the construction of said will under section 2615 of the Code of Civil Procedure, *held*: That the bequest made by the first paragraph is not a specific but a general legacy, and that the bequest of money in the Bank of Savings made by the second paragraph is a specific legacy. *Id.*

(30.) SAME.

That the second paragraph is not in effect a residuary clause.

That the property bequeathed by the first paragraph must be applied to the payment of debts, funeral and testamentary expenses, if these exceed the sum of \$225, before the property specifically bequeathed by the second paragraph can be applied to such purposes. *Id.*

(31.) SAME—SUSPENSION OF POWER OF ALIENATION—LIFE TENANT—JOINT DEED—REMAINDERMEN. See *Brevoort v. Townsend*..... 125

(32.) SAME—CONTINGENT REMAINDERS—DEVISE TO "ISSUE" OF DECEDENT CONSTRUED—DISTRIBUTION OF PROPERTY PER STIRPES.

A testator, after providing an annuity for his wife out of the net income of his real and personal property left in trust, gave the remainder to his trustees in two equal shares to collect and pay the net income of one share, after deducting one-half of the annuity to the use of each of

his daughters for life. After providing for the death of either of the daughters during the life of his wife, the will provided "Should my said wife die before either of my daughters then and in that case upon each daughter's death, I give, devise and bequeath the share in my said real and personal estate theretofore held in trust for her in equal portions unto her then surviving issue, if any; or, if no such issue shall then survive, I direct that her said share shall be added to the share then held in trust for my other daughter, if she shall then survive; or, if not, then I give, devise and bequeath the same in equal portions to her issue, if any then surviving." The testator's wife died before the daughters. One daughter died leaving her surviving nine children and one granddaughter who died on the day of her birth. The other daughter subsequently died without issue. Provisions of the will examined, and

Held, that it was the intention of the testator to limit the meaning of the word "issue," and that the share left in trust for the daughter who died without issue should be distributed among the issue of her sister *per stirpes*. Matter of Union Trust Co. 514

- (33.) SAME—POWER OF SALE—EXECUTORS AND ADMINISTRATORS—TITLE IN REAL ESTATE—OBJECTIONS TO ACCOUNT UPON INFORMATION AND BELIEF—OBJECTION TO PAYMENTS—RIGHT TO DEPOSIT IN CHECK ACCOUNT—COMMISSIONS—OBJECTION TO AMOUNT PAID ATTORNEY OVERRULED. See Matter of Bielby 164

- (34.) SAME—PROVISIONS OF—ADDITIONAL EXECUTORS—APPLICATION FOR APPOINTMENT OF ADMINISTRATOR WITH WILL ANNEXED.

Where a will provides for additional executors in the event that testator's wife, the principal legatee and sole executrix, should not survive him, but no provision is made for the event of her death after the grant of letters testamentary to her, the proper course upon her death is to apply for the appointment of an administrator with the will annexed. Matter of Robitscher. 351

- (35.) SAME—GIFT TO INDIVIDUALS NOT TO A CLASS—WHEN REMAINDER INTERESTS VESTED.

Where the will of testatrix gave to her executors the sum of \$30,000 in trust, the income thereof to be applied to the use and benefit of her nephew, Nathaniel Coles Pearsall, during his life, and at his death gave the sum of \$30,000 to Thomas Pearsall and Helen Pearsall, children of James B. Pearsall, share and share alike, held that the legatees took as tenants in common, the gift being to them *nominatim* and the use of the words "children of James B. Pearsall" being merely descriptive.

Further, *held*, that the remainder interests of Thomas and Helen Pearsall were vested. Matter of Pearsall. 165

(36.) SAME.

Parol evidence as to declarations of testatrix held inadmissible, where the words and language of the will are not ambiguous, or have a fixed and settled construction. *Id.*

(37.) SAME—WHEN PROBATE PROCEEDING DOES NOT ABATE—DECREE ADMITTING WILL TO PROBATE—JURISDICTION OF COURT.

A probate proceeding does not abate by reason of the death of any of the heirs at law and next of kin of decedent before the entry of the decree admitting the will to probate and such decree binds the personal representatives who voluntarily appeared in the proceeding and submitted to the jurisdiction of the court. *Matter of Herrmann*..... 218

(38.) SAME—GIFT TO CLASS—WHEN STATUTE OF LIMITATIONS NOT AVAILABLE—TRUSTEES. *Matter of Ralph*..... 183

(39.) SAME—DOMICILE—GIFT OF PERSONAL ESTATE TO FOREIGN TRUSTEES—CREATION OF ENDOWMENT—WHEN COURTS OF THIS STATE WILL NOT INTERPOSE TO PREVENT CARRYING OUT OF DISPOSITIONS MADE BY WILL. See *Stieglitz v. Attorney General*..... 121

(40.) SAME—REVOCATION BY SUBSEQUENT MARRIAGE AND BIRTH OF ISSUE—EFFECT OF ACQUISITION OF ADDITIONAL PROPERTY.

The question whether an ante-nuptial will has been revoked under section 35 of the Decedent Estate Law by a subsequent marriage and birth of issue must be determined by the state of facts and the condition of the testator's property at the date of the will.

Hence, proof of the acquisition of additional property after the making of such a will cannot avail to prevent its revocation under the statute. *Matter of Del Genovese*..... 425

(41.) SAME—PRESUMPTION OF REVOCATION.

Under section 35 of the Decedent Estate Law, marriage and parenthood do not raise a presumption of an intent to revoke, but are in themselves a revocation, unless express provision be made in view of the new duties arising from the changed relation. *Id.*

(42.) SAME.

Mere accumulation of property in addition to that possessed at the date of the ante-nuptial will cannot be considered as a "provision" made by the testator for the new dependents upon him as a husband and father. *Id.*

(43.) SAME—TRUST FOR LIFE, WITH REMAINDERS TO TESTATOR'S WIDOW, SON, OR ISSUE OF SON, IF LIVING, AT HIS DEATH—WHEN COLLATERALS DO NOT SHARE IN RESIDUARY ESTATE—WHEN BEQUESTS NOT PAYABLE IN DUPLICATE FROM SEPARATE TRUST ESTATES—WHEN ISSUE OF DECEASED LEGATEES TAKE PER CAPITA. See *U. S. Trust Co. v. Terry*.. 44

(44.) SAME—TRUST FOR TWO LIVES, REMAINDERS TO SURVIVING GRAND-CHILDREN EQUALLY—STATEMENT THAT GRANDCHILDREN TAKE PER STIRPES HOSTILE TO INTENTION OF TESTATOR—DIVISION OF ESTATE ON TERMINATION OF TRUST—WHEN REMAINDERS VEST SUBJECT TO POWER OF SALE—ELECTION OF REMAINDERMEN TO TERMINATE POWER OF SALE AND TAKE REAL PROPERTY AS SUCH. See *Van Cott v. Van Cott*..... 98

(45.) SAME—TRUST—PROVISION THAT ESTATE SHALL BE FREE FROM CLAIMS OF BENEFICIARY'S CREDITORS.

A testamentary provision that no part of a trust estate for the maintenance and support of the testator's son "shall go to or be had by, or be obtained in any manner by any creditor" of the said beneficiary, is valid although it is provided that the beneficiary is entitled to have the corpus of the estate transferred to him when he shall "become free and discharged from all his debts, judgments, claims and demands against him."

Hence, a judgment creditor of said beneficiary is not entitled to maintain an action to have the trust adjudged invalid as to creditors and to charge the estate with the payment of his judgment. *Siemers v. Morris* 488

(46.) SAME—DEVISE IN TRUST—DOWER—LIFE ESTATES—DUTIES OF EXECUTORS AND ADMINISTRATORS.

Where lands are devised in trust, the dower of testator's widow is preserved unless there is an obvious incompatibility between the actual assignment of dower and the complete operation of the trust. In such case the trust is not repugnant to the assertion of dower unless it is apparent that the trust requires the possession and control by the trustee of the entire lands. See *Matter of Fitter*..... 399

(47.) SAME—DEVISE TO EXECUTORS IN TRUST—WHEN GIFT NOT DEEMED CONTINGENT.

Where a gift over is contained only in a direction to pay and devise at the end of an intermediate estate, the gift will not be deemed contingent if by the utmost effort and cunning a contrary intention can be detected in the will. See *Matter of Lotz*..... 379

(48.) SAME—OF CERTAIN REAL ESTATE—WILLS—EXERCISE OF POWER OF SALE.

Where testator's daughter to whom he devised certain real estate was given full power to dispose of the same by will "so that the absolute fee in possession will ultimately and within the statutory period vest in her brother's heirs," she had the legal right to dispose of the land as she chose, and any provision in her will which would vest the land in one or more of her brother's heirs ultimately at the end of one life in addition to her own would be a complete exercise of the power. *Matter of McDonald* 376

(49.) SAME—DEVISE AS TO CERTAIN REAL ESTATE FOR LIFE—LIABILITY OF EXECUTOR TO ACCOUNT FOR PROCEEDS PAID TO TESTATRIX AS LIFE TENANT—ACCOUNTING—EXECUTORS AND ADMINISTRATORS.

Where many years prior to the death of testatrix the proceeds of certain real estate devised to her by her husband for life were lent or given for investment by her to her executor, he is not liable to account for such proceeds as were paid to his testatrix as life tenant under the will of her husband; the executor should, however, account for moneys which belonged to testatrix individually and which she loaned and gave to him to invest. *Matter of Pollock* 225

(50.) SAME—REAL PROPERTY—WILL—TENANTS IN COMMON.

A testatrix, by will drawn by a layman, gave and bequeathed unto her sons John and Thomas a homestead, with the buildings thereon "jointly to be divided by said sons as they may deem fit and proper, or to be held jointly if they choose." This was the only devise or bequest to John. The testatrix also gave two legacies "to be paid by my son John Haddock from the proceeds of his bequest."

Held, that the testatrix intended to use the term "jointly" in the sense of "together," and that John and Thomas were seized of the homestead as tenants in common. *Matter of Haddock* 507

(51.) SAME—TRUST OF UNPRODUCTIVE REAL ESTATE WITH IMPERATIVE POWER OF SALE—WHEN PROCEEDS SHOULD BE APPORTIONED BETWEEN INCOME PAYABLE FROM TIME OF TESTATOR'S DEATH TO LIFE BENEFICIARY AND PRINCIPAL BELONGING TO REMAINDERMEN—WHEN INCOME COMMENCES WHERE A CONVERSION OF PROPERTY IS REQUIRED TO FORM TRUST FUND—RATE OF INTEREST IN COMPUTING INCOME—WHETHER SUPREME COURT WILL ENTER-TAIN JURISDICTION OF AN ACTION WHERE RELIEF MIGHT BE OBTAINED IN SURROGATE'S COURT DISCRETIONARY. See *Lawrence v. Littlefield* 14

- (52.) SAME—TRUST—FAILURE TO NAME BENEFICIARIES—ACTION TO IMPRESS TRUST UPON PERSONAL PROPERTY—EVIDENCE DEHORS WILL IDENTIFY BENEFICIARIES—DECREE OF SURROGATE DECLARING TRUST PROVISION INVALID NOT RES ADJUDICATA. See Reynolds v. Reynolds..... 37
- (53.) SAME—TRUST FOR CHARITABLE PURPOSES—BENEFICIARIES MAY BE INDEFINITE—DECREE DECLARING INVALIDITY OF TRUST ENTERED AFTER DEATH OF TRUSTEE—WHEN EXECUTION OF TRUST DEVOLVES UPON SUPREME COURT—WHEN TRUST ESTATE DOES NOT REVERT TO CREATOR ON MISAPPLICATION OF FUNDS BY TRUSTEE. See Stewart v. Franchette..... 81

